NO. 75-1254

In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL W. WILLIAMS and
ROBERT O. WILLIAMS, on behalf
of themselves and all others
similarly situated,
Petitioners

v.

AMERICAN AIRLINES, INC. and
TRANS WORLD AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL W. WILLIAMS
518 S. Tancahua
Corpus Christi, Texas 78401
(512) 884-0473

Attorney for Petitioners

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MICHAEL W. WILLIAMS and ROBERT O. WILLIAMS, on behalf of themselves and all others similarly situated, Petitioners, pray to this Honorable Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit which was final in this case on December 8, 1975.

OPINIONS BELOW

There is no published opinion by the United States District Court, Northern District of Illinois, Eastern Division. Petitioners received a copy of a docket sheet dated December 10, 1973, with the following notation written on it: "On Court's own motion order cause dismissed with prejudice and without costs on the ground that cause is moot." Judge Hubert L. Will was the presiding judge.

The Court of Appeals, on December 8, 1975, handed down an opinion, not yet reported, affirming the trial court's judgment. That opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals became final on December 9, 1975. Federal jurisdiction was originally invoked under 28 U.S.C. 1337 and the Federal Aviation Act of 1958, 49 U.S.C. 1301, et seq.

QUESTIONS PRESENTED

This case presents the issue of whether an

admitted and adjudged violation of federal law requiring notice and hearing preliminary to a Board established rate order, renders the resulting order void or merely voidable.

Also presented is the question of whether an administrative determination of reasonableness of fares can moot or effectively moot a question of law presented to a court by litigants in an independent common law action preserved to them by federal statute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Questions are raised in regard to the constitutional requirement of Procedural Due Process. Amendment 5, United States Constitution.

49 U.S.C. 1343(d) and (e) and 49 U.S.C. 1506, provisions of the Federal Aviation Act, also form a basis for this litigation.

STATEMENT OF THE CASE

The record in this case consists of the record on appeal and a transcript of proceedings. The

record and transcript are now on file with the Clerk of the United States Court of Appeals for the Seventh Circuit.

From October 1, 1969 to October 15, 1970, the air carriers were collecting fares from the air-travelling public, including petitioners, pursuant to an order of the Civil Aeronautics Board, held to be unlawful in Moss v. C.A.B., 430 F.2d 891 (1970). Statutory requirements of notice and hearing set out in 49 U.S.C. 1343 (d) and (e) were admittedly not complied with. On July 21, 1970, Petitioners filed a complaint in the United States District Court for the District of Columbia for recovery of Money Had and Received against two air carriers to recover monies paid in excess of the valid existing rate. The complaint was brought as a class action. On August 11, 1970, Petitioners moved for a summary judgment against the air carriers on the issue of liability.

Petitioners' cause was subsequently consolidated with other similar actions in the United States District Court, Northern District of

Illinois, Eastern Division by the Judicial Panel on Multidistrict Litigation.

Motions relating to the class action aspects of the case were filed in that court by plaintiffs in the consolidated action but were not ruled upon by the court.

On December 10, 1973, the court dismissed Petitioners' case with prejudice on the grounds that the cause is moot. There were numerous "reports on status" and "status calls" in the trial court. A trial, however was never held and no ruling on Petitioners', nor on the air carriers', motions for summary judgment were made by the trial court.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS, IN EFFECT, DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In Moss v. C.A.B., 430 F.2d 891 (1970), there was a holding that the CAB had determined rates "within the meaning of Section 1002(d) and (e) of

the Federal Aviation Act, 49 U.S.C., sec. 1482 (d) and (e) without complying with the requirements of those sections that this be done after notice and hearing." (As summarized in Moss II--Moss v. C.A.B., 521 F.2d 298, 301).

It has been specifically held that the denial of a hearing granted by statute is a denial of due process of law. The Supreme Court did not invalidate that tenet in Storer Broadcasting v. U.S., 220 F.2d 204, rev'd on other grds. 351 U.S. 192.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in nature are void if a hearing was denied." ICC v. Louisville & Nashville Ry. Co., 227 U.S. 88, 91.

In United Gas Pipe Line Co. v. Mobile Gas Service Corp., et al, 350 U.S. 332, there was non-compliance with notice requirements in section 4(d) of the Natural Gas Act. It resulted in the new schedule calling for increased rates being declared a nullity insofar as it purported to

change the then existing lawful rate. (The Supreme Court unanimously held that any amounts paid in excess of the existing lawful rate were unlawfully collected and the natural gas company was obligated to make restitution of the excess payments.) 350 U.S. 347.

Throughout this present litigation the carriers and the Board have contended that the illegal rates were voidable and that questions of reasonableness and equity should be considered in an action for restitution. The Court of Appeals so held. (App.A. p.17) They all rely almost totally upon Atlantic Coast Line v. Florida, 295 U.S. 301 (1935), a case where there was an absence of specific findings supporting an ICC order. Since the requirement for sufficient findings has been held by this Supreme Court to be not based on due process in Pacific States Box and Basket Co. v. White, 296 U.S. 176, Petitioners have always denied Atlantic Coast Line's relevance to the present case.

The effect of the U.S. Court of Appeals' ruling below is to hold that administrative orders issued

after violation of statutory provision for procedural due process are merely voidable and not void and that violations of due process safeguards are tantamount to mere slips or minor procedural defects. Thankfully, there are few cases where government agencies--with or without members of their regulated industries--violate due process by ignoring statutory requirements of notice and hearing. When it has happened, resulting orders have always been held void.

In that respect, the decision of the Court of Appeals below is in conflict with every applicable decision of the United States Supreme Court.

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN ALLOWING AN ADMINISTRATIVE FINDING TO EFFECTIVELY MOOT PLAINTIFF'S STATUTORILY PRESERVED COMMON LAW ACTION BEFORE THE COURTS, AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S SUPERVISION.

The trial court and the United States Court of

Appeals for the Seventh Circuit erred in holding that an administrative holding by the Civil Aeronautics Board could moot or effectively moot a question of law before the courts and deny Petitioners the right to proceed with a common law action (money had and received) preserved to them by 49 U.S.C. 1506.

The ostensible purpose of the CAB hearing was to determine the "reasonableness vel non" of the air tariffs established by the adjudged invalid order of October 1, 1969. The Petitioners have consistently pointed out the futility of those proceedings since the Board is without power to make restitution and since the Board acted with the air carriers to violate the provisions of the Federal Aviation Act calling for notice and hearing. (Moss v. C.A.B., 430 F.2d 891 (1970), at pp. 893-5).

This entire case turns upon one question of law. It was presented for review by the Court of Appeals thusly: "Whether an admitted and adjudged non-compliance with the notice and hearing requirements

of the Federal Aviation Act rendered a resulting invalid administrative order void or merely voidable."

The CAB is powerless to decide this type of pure question of law except, perhaps, by implication. If the order is void, all findings related to reasonableness and equity are meaningless. If it is voidable, such findings would be controlling. No court, administrative board, nor mortal, can breathe life into something that is void.

The Petitioners have a constitutionally protected right not to have their cause of action taken from them by a narrow administrative adjudication to which they were not a party, which may be irrelevant, and which did not and could not treat the question of law they raised before courts of competent jurisdiction.

CONCLUSION

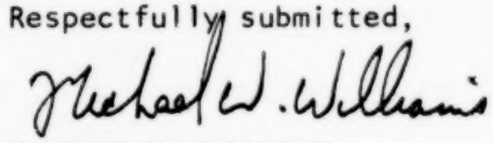
The record below is one of possible irrelevance, confusion and incompleteness. The end result, however, is a Court of Appeals holding which can have a major, if not revolutionary, impact upon

certain areas of constitutional and administrative law. If, all at once, procedural due process violations are to be treated as mere procedural defects, the Supreme Court should speak to that point. If, all at once, administrative agencies can reach out and "moot" pure questions of law before the courts in independent common law actions, the Supreme Court should speak to that point also.

This case strongly calls out for oversight and review by this Supreme Court.

For those reasons, Petitioners respectfully submit that their petition for writ of certiorari should be granted.

Respectfully submitted,



MICHAEL W. WILLIAMS
518 S. Tancahua
Corpus Christi, Texas
78401
(512) 884-0473

CERTIFICATE OF SERVICE

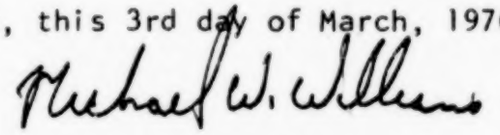
I certify that three (3) copies of the foregoing Petition for Certiorari were served on each of the respondents by sending said copies air mail, postage prepaid, to the following persons and addresses:

Lee N. Abrams, Esq.
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
Attorney for Trans World Airlines and
American Airlines,

William M. Brinton, Esq.
One Maritime Plaza
San Francisco, California
Attorney for Keith Roberts, et al.,

and Edward A. Berman, Esq.
134 North LaSalle Street
Chicago, Illinois

in conformity with Rules 21 and 33 of the United States Supreme Court, this 3rd day of March, 1976.



MICHAEL W. WILLIAMS
518 S. Tancahua Street
Corpus Christi, Texas 78401
(512) 884-0473

ATTORNEY FOR PETITIONERS

APPENDIX A

OPINION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

NOS. 74-1108, 74-1146 and 74-1246

Keith Roberts, et al.,
Plaintiffs-Appellants,
v.

American Airlines, Inc., et al
Defendants-Appellees.

Michael Williams, et al.,
Plaintiffs-Appellants,
v.

American Airlines, Inc., et al
Defendants-Appellees.

Alan Weidberg, et al.,
Plaintiffs-Appellants,
v.

American Airlines, Inc., et al.,
Defendants-Appellees.

Air Travelers Association, et al.,
Plaintiffs-Appellants,
v.

Air Wes., Inc., et al.,
Defendants-Appellees.

Appeals from the United States District Court for
the
Northern District of Illinois
Eastern Division
Nos. 71 C 783, 71 C 711, 70 C 1879, 71 C 785
HUBERT L. WILL, JUDGE

Argued September 8, 1975
Decided December 8, 1975

Before CASTLE, Senior Circuit Judge, SWYGERT and PELL, Circuit Judges.

PELL, Circuit Judge. These four appeals, consolidated in this court for hearing and disposition, are brought by some of the plaintiffs following an adverse judgment in the district court.

In August, 1969, twenty of the principal domestic air carriers filed tariffs which increased domestic air passenger fares. On September 12, 1969, the Civil Aeronautics Board (CAB) suspended these tariffs under 49 U.S.C. sec. 1482(g) (1964), but announced that it would accept, without suspension, tariffs which utilized a proposed fare formula. The carriers then withdrew their suspended tariffs and filed new tariffs in accordance with the Board's proposed fare formula. The carrier-filed tariffs were allowed to stand without suspension or investigation.

Thirty-two interested Congressmen then petitioned for review alleging that the CAB, by excluding the public from ex parte meetings with representatives of the air carriers and by holding a pro forma public hearing, had unlawfully approved

the increased fare structure. In Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), (Moss I), the Court of Appeals held that the September 12 order was invalid and the tariffs filed by the carriers based thereon were unlawful. Subsequently, a number of class actions were filed on behalf of all or a portion of the passengers on domestic airlines who paid the increased fares, seeking recovery of an amount measured by the alleged illegal increase. The Judicial Panel on Multidistrict Litigation ordered that all of the class actions be transferred to the United States District Court for the Northern District of Illinois for coordinated or consolidated pretrial proceedings under 28 U.S.C. sec. 1407. In re Air Fare Litigation, 322 F.Supp. 1013 (J.P.M.L. 1971). Following transfer, the defendants moved to stay the proceedings pending completion of a CAB investigation entitled "Reasonableness of Passenger Fares charged by Domestic Trunkline and Local Service Carriers from October 1, 1969, through October 12, 1970." In Weidberg v. American Airlines, Inc., 336 F.Supp. 407 (N.D. Ill. 1972), the court granted the stay motion and ordered that all proceedings in the litigation be held in abeyance until further order. On June 1, 1972, this court denied a petition for mandamus seeking to upset the stay order.

No further action, except routine status reports, took place in the suits for approximately eighteen months following this court's denial of the mandamus petition. Meanwhile, the CAB completed its investigation of the reasonableness of passenger fares and, on July 11, 1973, issued Order No. 73-7-39. This order denied to air passengers recovery of any part of the unlawful fares on the grounds that the fares in question were not unjust or unreasonable, and, in any case, resulted in no unjust enrichment of the airlines. After the publication of the CAB order, the district court indicated, during the regular status reports, that he was disposed to grant the defendants' motion to dismiss. At a subsequent status

call, the district court judge expressed his view that the seven damage actions were moot. The district court judge observed that absolutely nothing was happening in the case and had not for a year, and he suggested that he would dismiss the cases, subject to reinstatement should the District of Columbia Court of Appeals reverse the CAB finding of just and reasonable rates.

On December 20, 1973, the district court, on its own motion, dismissed the seven actions with prejudice and without costs on the ground that the causes were moot. Four of the civil actions which were appealed are encompassed in these consolidated appeals;[1] the named plaintiffs in the other three actions did not seek appellate review. The appellants seek to reverse the judgment of dismissal.

The procedural history of these cases is inextricably related to other administrative and judicial proceedings. On July 16, 1973, Congressman John E. Moss and some twenty-four colleagues petitioned for direct review of CAB Order No. 73-7-39. It was they who had instituted the CAB proceedings which culminated in that order, just as it was they (or a similar group) who secured the Moss I ruling that invalidated the September 12, 1969, order. Keith Roberts, a named plaintiff in one of the district court suits and appellant in No. 74-1108, also filed a petition (No. 73-1790) seeking review of the 1973 order.

He had successfully sought to intervene before the CAB in the proceedings which produced the Board's final decision in Order No. 73-7-39, and he was also allowed to intervene in the Moss review petition (No. 73-1772).

At the time of oral argument of the present appeals, there had been no decision in the related review petitions. Subsequent to oral argument, the D.C. Circuit in Moss v. CAB, 521 F.2d 298

(D.C. Cir. 1975), (Moss II), affirmed the challenged order. That court faced the question as to whether there was to be a recovery of any part of the unlawful fares, and it concluded that the decisional principles used by the CAB in denying such relief were determunative and correctly applied. Not only did the court expressly hold that the petitioners (Moss and Roberts) had no right to recover all amounts in excess of the last lawfully established rates, but it also confronted, and rejected, the alternative claim that recovery of an amount measured by the difference between the charged fares and "reasonable" fares was available to the Moss petitioners or to Roberts.

The question originally raised in these consolidated appeals was whether passengers are entitled to recover damages or secure restitution of monies paid under illegal air passenger tariffs which the Civil Aeronautics Board has found not to be unjust or unreasonable. As originally argued, our primary task was to explicate the precise legal meaning of the Moss I holding that the September 12, 1969, CAB order was invalid and that the passenger tariffs were illegal. 430 F.2d at 902. The opposing parties found different meanings in the opinion, and they directed argument to the question whether the 1969 order was void or voidable. We think that Moss II clearly and correctly explicates the earlier decision and establishes that the CAB order attached in Moss I was voidable rather than void.

Accordingly, we need not undertake a lengthy analysis of the substantive questions of law raised in these appeals. However, Moss II does not effectively resolve all of the vexing questions raised here, and we deem it necessary to address ourselves to some of the remaining problems.

I. Res Judicata and Mootness

A. Res Judicata

At the January 14, 1974, hearing on the motion to reconsider the orders of dismissal, the district judge focused directly on the impact on the present cases of an affirmance of CAB Order No. 73-7-39:

THE COURT: * * *

"My logic is, in fact, the dismissal stands because the District Court of Appeals, District of Columbia affirms that the fares were reasonable and fair, that that is res judicata, and it takes care of the issue once and for all, or, at least it is estoppel by judgment if not res judicata. There may be some technical differences between the parties.

* * *

"However, there is no damage cause if these improperly adopted fares are subsequently determined to be fair and reasonable, then I don't know what there is left to litigate, except to give it to some law school moot court, or put it on an examination; but, there is nothing more useless than litigating issues from which there can be no recovery in the nature of damages or other relief.

"So, the fact that the FAA (sic) has now found these fares to be reasonable, and that is now on appeal, seems to me means that these cases will all be moot. They are moot at this point unless that determination is reversed." (Emphasis added.)

Accordingly, the district court dismissed the cases as moot, with the proviso that it would reinstate the causes should the challenged CAB order later be reversed.

The above quotation from the transcript puts flesh on the bare bones of the formal minute order. The latter statement embodies only a one-sentence formulation, grounding the dismissal on "mootness." Our own reading of the record convinces us that the district court concluded that all of the plaintiffs' claims for restitution were barred by the CAB determination that the air passengers were not injured by paying the fares in question. The lower court relied on the fundamental legal premise that mere illegality which causes no injury is not ordinarily compensable. Thus, the district judge disposed of the cases upon the basis that the CAB finding that the challenged fares were not unjust and unreasonable necessarily implied that the plaintiffs had not been injured and the defendants had not been unjustly enriched.

At the time of the dismissal order, of course, the challenged CAB order was the subject of review proceedings. As we have previously noted, appellant Keith Roberts was a party to the review petitions. Similarly, some fourteen airlines, the defendants-appellees in Appeal No. 74-1108, were allowed to intervene in the review process. Since there is identity of parties and issues, the principles of res judicata and collateral estoppel bar the restitution claims of Roberts.

Under 28 U.S.C. sec. 2106, this court may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review. Accordingly, we modify the dismissal order entered in Appeal No. 74-1108 so as to represent a Rule 56(b) summary judgment in favor of the defendants on all counts in the Roberts complaint, on the ground that Moss II establishes, as a matter of law, that Roberts has no right to recover from the air carriers. As so modified, the judgment is affirmed.

The other plaintiffs-appellants stand in a somewhat different technical position. The record

indicates, and the Moss II opinion confirms, that they were not parties to the CAB proceedings which led to Order No. 73-7-39 and that they did not successfully intervene in the review petitions adjudicated in the Moss II decision. Accordingly, there is no strict res judicata effect of that decision regarding the claims of Weidberg, Williams, and the Air Travelers Association.

B. Mootness

In most litigation, the continuing existence of a dispute is not questioned, and the court can readily find that there exists a subject matter on which the court's judgment can operate to make a substantive determination on the merits. See Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373 (1974). Courts have traditionally declined to hear cases in which neither party stands to gain or lose by a decision on the theory that the state should not be burdened with the expense of trying such controversies. Id. at 374. The doctrine that courts will not hear moot cases prevents the useless expenditure of judicial resources. Id. at 375-76. Indeed, it has been stated that "(i)n the cases where issues have become moot as a result of judicial decision, or otherwise, the courts unquestionably have the authority, and it often becomes their duty, to dismiss cases sua sponte and without any motion to dismiss being made." Myers v. Polk Miller Products Corp., 201 F.2d 373, 376 (C.C.P.A. 1953).

The transcript of the January 14, 1974, hearing, part of which is set forth above, establishes that the district judge used the word "moot" to mean that the plaintiffs had suffered no injury by paying the fares in question and could not recover any monetary damages. The ambiguous usage of the term resulted in appellate briefs setting forth numerous cases exploring this subtle jurisprudential concept. We need not determine whether the district judge was correct in determining that the

causes were moot as of the date of his dismissal order, for the case law establishes an independent and adequate ground for affirmance.

In Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970), cert denied, 400 U.S. 828, this court had before it a judgment dismissing the complaint with prejudice on the merits where problems of motion practice raised important procedural issues. The Schy decision held that a motion to dismiss based upon a lack of damages may properly be treated as a motion to dismiss under rule 12(b) (6). Id. at 1115. The court quoted approvingly from Premier Malt Products Co. v. Kasser, 23 F.2d 98, 99 (E.D.Pa.1927), where the court observed:

> "There must be both the injuria and the damnum to give a legal cause of action, and this remains true notwithstanding the legal fiction of nominal damages. Indeed, this truth made the legal fiction logically necessary."

Accord, Citrin v. Greater New York Industries, 79 F.Supp. 692, 694-95 (S.D.N.Y. 1948); Package Closure Corporation v. Sealright Co., 4 F.R.D. 114, 116 (S.D.N.Y. 1943). Moreover, Schy, supra, recognized that a motion to dismiss made after the filing of an answer not only served the same function as a motion for judgment on the pleadings and might be regarded as one, id. at 1115, but could be treated as a motion for summary judgment under Rule 12(c). Id. at 1116.

In this case, the defendant air carriers moved for dismissal on the grounds that plaintiffs had failed to state a claim for which relief could be granted. Moreover, shortly after entry of CAB Order No. 73-7-39, the defendants filed a motion for summary judgment dismissing the consolidated actions on the ground that the CAB decision precluded recovery by the plaintiffs. The air carriers insisted that there was no genuine issue

as to any material fact and that they were entitled to the requested summary judgment of dismissal as a matter of law.[2] The plaintiffs responded to this motion by arguing that the pending appeal in Docket No. 73-1772 (the Moss review petition) made the summary judgment request premature, by adopting all their filed legal memoranda as an answering memorandum, and by citing additional legal authority in opposition to the motion. The plaintiffs placed great reliance on the pendency of the appeal, and they argued that no findings or conclusions in Order No. 73-7-39 could possibly be considered final. Significantly, however, they made no direct argument that there was a genuine issue as to any material fact.

We think that, in substance, if not in form, the district court granted the defendants' motion for summary judgment. Under the authority of Schy, we treat the challenged dismissal order as a Rule 56(b) summary judgment on all counts in the complaint in favor of the defendants. As so modified the judgment is affirmed.

II. Non-Consideration of the Class Action Question

Another major problem still remaining in this appeal stems from the failure of the district court to consider or determine whether the suits should be maintained as a class action. Although inadequate compliance with F.R.Civ.P. 23(c)(1) has emerged in a number of recent appeals taken to this court, see, e.g., Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975); Jimenez v. Weinberger, ...F.2d .....No. 75-1046 (7th Cir. September 12, 1975), neither side in the present case has briefed or argued the legal effect of the district court's failure to make the class determination in the instant cases.

This court has recently determined that, in an appeal from a decision on the merits made without

the prior class determination required by Rule 23(c)(1), the reviewing court will treat the case as one brought by the named plaintiff only and not as a class action. Case & Co., Inc. v. Board of Trade of City of Chicago, 523 F.2d 355, 360, (7th Cir. 1975). Accordingly, we treat these cases as brought solely on behalf of the named plaintiffs.

Under established principles, the Rule 56(b) summary judgment against the named plaintiffs will not protect the defendant air carriers against other members of the class under the doctrine of res judicata, see Katz v. Carte Blanche Corp., 496 F.2d 747, 758-759 (3d Cir. 1974), cert. denied, 419 U.S. 885. However, the defendants, by moving for summary judgment prior to the class determination and the sending out of class notice, assumed risk that a judgment in their favor would not protect them from subsequent suits by other potential class members. See Haas v. Pittsburgh National Bank, 381 F.Supp. 801, 806 (W.D.Pa. 1974), rev'd on other grounds, ...F.2d....., No. 74-2190 (3d Cir. September 25, 1975). Since the defendants sought summary judgment on the ground that the named plaintiffs could not recover monetary damages, they have the not inconsequential protection of stare decisis regarding identical claims of unnamed plaintiffs. See Katz, supra at 759; see also Haas, supra at 806. Although the air carriers have never expressly stated that they would be content to rest on the protection of stare decisis rather than upon res judicata, we think that the circumstances of this case authorize the court to infer such a concession.

Moreover, our recent decisions leave room for no other approach. In Peritz, the district judge severed a central liability issue from the class action determination issue and deferred resolution of the latter until after a jury determined whether the defendant's loan form clearly and conspicuously disclosed that credit life and/or dis-

ability insurance was not required for obtaining a loan from Liberty Loan Corporation. After the return of a special verdict establishing liability, the judge determined that a class action could be maintained on the claims remaining in issue. This court ruled that the language of Rule 23(c) clearly requires class certification prior to a determination on the merits. (emphasis in original). The court was constrained to hold that certification of the class was delayed beyond the permissible period allowed by the rule.

In Jiminez, the trial court certified the case as a class action after a decision on the merits. The real problem lurking in the case was the possibility of one-way intervention whereby a potential plaintiff could await a resolution of the merits before deciding whether or not to join the suit. This court in the recent Jiminez opinion indicated that, in some cases, the final certification need not be made until the moment the merits are decided. (emphasis in original). Since the class allegations in that case met the requirements of subdivision (b)(2) of Rule 23 rather than subdivision (b)(3), the court thought it fair to infer that the timing of certification in the former kind of class suit could differ from the timing required in the latter. Because the allegations met (b)(2) requirements, the court was able to avoid concluding that non-certification required automatic reversal. Significantly, however, Jiminez plainly stated that a reversal would almost certainly have been required in the class action had it been maintained under subdivision (b)(3).

In the instant appeals, the class allegations fall under subdivision (b)(3). Moreover, at least one of the named plaintiffs formally moved for certification of the suit as a class action. We conclude that under the mandatory language of Rule 23(c)(1) and our prior decisions, the district court could not, should we remand the

present actions for entry of Rule 56(b) summary judgments, proceed to make a delayed class certification. Thus, there is no way under the federal rules of procedure for the defendant air carriers to secure the protection of res judicata. They must rest content with the stare decisis protection. We cannot countenance a patent violation of Rule 23.

We have examined the other contentions raised by appellants, and we find them meritless. Accordingly, we modify the orders of dismissal, and, treating them as summary judgment that the named, individual plaintiffs are barred from securing restitution from the defendant air carriers, we affirm.

Affirmed as Modified.

Footnotes

[1]No separate docket number has been assigned in the appeal Air Travelers Association, et al v. Air West, Inc., et al., which was docketed below as C-785. The February 12, 1974, notice of appeal filed in Alan Weidberg, et al v. American Airlines, Inc., et al., Appeal No. 74-1246, clearly stated that Air Travelers Association, et al., was appealing from the January 14, 1974, final judgment in these actions.

[2]The defendants-appellees relied on the same decisional principles found determinative by the CAB and, later, by the Moss II court. We have made an independent analysis of the precedents, and we agree with the Moss II decision. The allegations in the various complaints filed by the plaintiffs-appellants differ somewhat in language, but the general thrust of the language aims at a common law declaration for money had and received. We accept as conclusive the CAB finding, now affirmed by the Moss II court, that the air carriers were not unjustly enriched by collecting the fares in question. Under these circumstances, Atlantic Coast Line R.R. v. Florida, 295 U.S. 301 (1935), and United States v. Morgan, 307 U.S. 183 (1939), preclude a restitutionary remedy. If Schy and its analysis were not proper authority for treating the dismissal order as a grant of summary judgment for the defendants-appellees, we could properly conclude that the Williams, Weidberg, and Air Travelers Association claims were effectively mooted at least as of the date October 16, 1975.

[3]While this opinion was in the final stages of preparation, counsel for the appellants brought to our attention that Roberts had filed a petition for rehearing in the D.C. Circuit in Moss II with the suggestion that the matter be reheard en banc. From some points of view, of course, the litigation may not be final until either there has been

a denial of certiorari or consideration and decision by the Supreme Court following the granting of a petition for certiorari. For that reason we find it necessary to state that a preliminary draft of an opinion had been prepared in the present appeals prior to Moss II which reached the same result as did the opinion in that case and for substantially the same reasons. No purpose was seen in preparing the final draft of this opinion for repeating what Judge McGowan stated so effectively in Moss II.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1254

MICHAEL W. WILLIAMS, ET AL.,
Petitioners,

vs.

AMERICAN AIRLINES, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS AMERICAN AIRLINES, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

H. TEMPLETON BROWN,
BRYSON P. BURNHAM,
LEE N. ABRAMS,
STEPHEN M. SHAPIRO,
Attorneys for Respondents American Airlines, Inc. and Trans World Airlines, Inc.

MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
312—ST2-0600,
Of Counsel.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 526 F. 2d 757, and a copy of that opinion is attached to the Petition as Appendix A. The judgment of the District Court dismissing the action was entered without opinion. An earlier opinion of the District Court granting defendants' motion to stay proceedings in the consolidated damage actions pending determination of related issues by the Civil Aeronautics Board is reported at 336 F. Supp. 407 as *Weidberg* v. *American Airlines, Inc.*, and a copy of that opinion is attached hereto as Appendix A. That opinion analyzes in detail the legal principles upon which the District Court based its subsequent decision dismissing the consolidated damage actions.

QUESTIONS PRESENTED

When particular domestic air passenger tariffs have been invalidated by a Court of Appeals due solely to a procedural error committed by the Civil Aeronautics Board, but the Civil Aeronautics Board subsequently has determined (in proceedings conducted in compliance with the order of that Court of Appeals) that the fares charged pursuant to those tariffs were not unjust or unreasonable and that the carriers were not unjustly enriched by collecting those fares, and the Board's determination has thereafter been affirmed by that same Court of Appeals, are the passengers who paid the fares in question precluded from recovering money damages based on alleged overcharges?

a. Are the passengers entitled to recover damages even though they were not injured, and the fares which they paid were not unreasonable?

b. Are the passengers entitled to recover damages even though the fares which they paid were established by tariffs which were legal, valid and binding at the time the fares were collected—tariffs with which the air carriers were required by law to comply?

c. Are the defendant air carriers required to pay damages even though they have not been "unjustly enriched" by collecting the fares in question?

STATEMENT

The instant case is one of seven damage actions which were consolidated in the United States District Court for the Northern District of Illinois pursuant to 28 U. S. C. § 1407. District Judge Hubert L. Will dismissed all seven of those damage actions on December 10, 1973. The named plaintiffs in four of those damage actions (including the instant case) appealed Judge Will's decision to the Court of Appeals for the Seventh

Circuit; the named plaintiffs in the other three damage actions did not seek appellate review. The four appeals were consolidated for hearing and disposition, and on December 8, 1975 the Court of Appeals affirmed Judge Will's decision dismissing the damage actions; as noted above, the opinion of the Court of Appeals is reported at 526 F. 2d 757, and a copy of that opinion is attached to the Petition as Appendix A. The instant case is the only one in which this Court has been asked to review the decision of the Court of Appeals for the Seventh Circuit; the named plaintiffs in the other three damage actions which were encompassed by that decision have not sought review in this Court.

Petitioners and the plaintiffs in the companion damage actions sought to recover alleged overcharges on domestic air passenger fares which the defendant air carriers had collected during the period from October 1, 1969 through October 14, 1970. In some of those actions as many as twenty air carriers were named as defendants, but in the instant case only two air carriers (respondents here) were named as defendants. The various damage actions purportedly were brought on behalf of all persons who purchased domestic air passenger transportation during the specified time period, but the District Court did not decide whether any of those suits could properly be maintained as a class action. The seven damage actions initially were filed in several different courts, but on February 19, 1971 the Judicial Panel on Multidistrict Litigation, acting pursuant to 28 U. S. C. § 1407, entered an order consolidating those actions for pretrial purposes before the United States District Court for the Northern District of Illinois, Eastern Division. The seven consolidated cases initially were assigned to Judge Alexander Napoli of that Court; after Judge Napoli's death the cases were reassigned to Judge Hubert L. Will.

The seven damage actions were filed in the wake of *Moss* v. *Civil Aeronautics Board*, 430 F. 2d 891 (D. C. Cir. 1970) ("*Moss* I"). The Court of Appeals for the District of Columbia

there held that the domestic air carrier tariffs prevailing during the period from October 1, 1969 through October 14, 1970 were invalid due to a procedural error committed by the Civil Aeronautics Board, and remanded the case to the Board for further proceedings.*

The petitioners in that litigation, Congressman Moss of California and a number of other Congressmen (hereinafter referred to as "Congressman Moss, *et al.*"), then requested the Board to "promptly initiate an adjudicatory proceeding for the purpose of determining appropriate relief [for alleged rate overcharges] for the period extending from October 1, 1969 through the date on which the lawful domestic passenger fares are reestablished". The Board, after considering briefs filed by Congressman Moss, *et al.* and a number of air carriers with respect to that request, concluded that no monetary relief should be awarded unless the fares in question were "unjust" or "unreasonable"; therefore it deferred its determination as to the "appropriate relief" (if any) pending the outcome of an investigatory proceeding "to determine whether the passenger fares between points in the 48 contiguous States and the District of Columbia in effect during the period October 1, 1969 to and including

* In August 1969, twenty of the principal domestic air carriers had filed tariffs which increased domestic air passenger fares. On September 12, 1969, the Civil Aeronautics Board issued Order 69-9-68, Docket 21322, which suspended those tariffs under 49 U. S. C. § 1482(g), on the ground that the tariffs "may be unjust [or] unreasonable". In that Order the Board (a) stated that the carriers were in need of additional revenue due to increased expenses; (b) proposed a fare formula; and (c) announced that it would accept, without suspension, tariffs which utilized that proposed fare formula. The carriers then withdrew their suspended tariffs and filed new tariffs in accordance with the Board's proposed fare formula; those new tariffs became effective on October 1, 1969, and during the period from October 1, 1969 through October 14, 1970 the carriers charged the fares which were specified in those new tariffs. In *Moss* I the Court of Appeals for the District of Columbia held that the Board's September 12, 1969 order and the subsequent filing of tariffs by the carriers actually constituted rate making by the Board under 49 U. S. C. § 1482(d), and that those tariffs therefore were invalid because the Board had entered its order without the public hearing provided for in that statute.

October 14, 1970 * * * were unjust and unreasonable" (Board Order 71-2-109, p. 10). That proceeding (CAB Docket No. 23140) was captioned "The Reasonableness of Passenger Fares Charged by Domestic Trunkline and Local Service Carriers from October 1, 1969 through October 14, 1970".*

Shortly after the seven damage actions were consolidated before the District Court, the defendant air carriers moved to stay all proceedings in those damage actions pending a determination by the Civil Aeronautics Board with respect to the reasonableness of the domestic air passenger fares in question. In support of that motion, the carriers asserted that the damage action plaintiffs had suffered no legally compensable injury—and therefore could not recover any damages—because the fares in question were not "unjust" and "unreasonable" and the carriers had not been "unjustly enriched" by collecting those fares; the carriers also asserted that questions relating to the reasonableness of domestic air passenger fares were within the exclusive primary jurisdiction of the Civil Aeronautics Board. The damage action plaintiffs (including petitioners) contended that they could recover damages whether or not the fares in question were unjust or unreasonable, and whether or not the defendant air carriers were unjustly enriched by collecting those fares. On January 12, 1972, Judge Napoli, after considering extended briefs filed by the various parties, granted the carriers' motion to stay all proceedings in the consolidated damage actions pending the Civil Aeronautics Board's determination as to the reasonableness of the fares.

Judge Napoli's opinion (a copy of which is attached hereto as Appendix A) analyzed the applicable legal principles in careful detail. Judge Napoli pointed out first that the damage action plaintiffs could not recover unless the fares which they had paid were unreasonably high, because "the [Federal Aviation] Act

* The Board's order instituting that investigatory proceeding was issued on February 24, 1971—six days after the Judicial Panel on Multidistrict Litigation ordered consolidation of the damage actions for pretrial purposes.

allows reasonable fares and it cannot be doubted that the carriers are entitled to a reasonable rate of return" (336 F. Supp. at 411; Appendix A, p. A8). He then emphasized the fact that if the damage action plaintiffs did not pay unreasonably high fares, then they were not injured as a result of the Board's error (which, as Judge Napoli pointed out, "was of a procedural nature" (336 F. Supp. at 411; Appendix A, p. A8)). He concluded that the principles enunciated by this Court in *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301 (1935), were "decisive", stating:

> "* * * there is considerable merit in the position that in weighing the equities of this case, the question of the reasonableness of the fares will play an important or even decisive role. Paraphrasing Cardozo [in the *Atlantic Coast Line* decision], in order for plaintiffs to prevail it must appear that the equities are so in favor of the plaintiffs that this court is duty bound to make the air carriers pay a considerable sum as reparations for the blunder of the C.A.B." (336 F. Supp. at 410-411; Appendix A, p. A7.)

Judge Napoli also concluded that issues as to the reasonableness of the domestic air passenger fares in question were within the exclusive primary jurisdiction of the Civil Aeronautics Board (336 F. Supp. at 409; Appendix A. pp. A4-A5), and therefore that it was appropriate to defer further proceedings in the damage actions until the Board decided those issues. Judge Napoli went on to state:

> "Since the question of the reasonableness *vel non* of the fares falls within the primary jurisdiction of the C.A.B., the plaintiffs in order to avoid a stay must proceed on the theory either that they have a claim for relief independent of unjust enrichment, which would rest upon common-law or statutory construction, or that they are absolutely entitled to recover due to the declaration of unlawfulness by the *Moss* court. At the expense of lengthening this opinion the court will turn to and examine the pertinent authorities and arguments of the respective parties on these issues." (336 F. Supp. at 409-410; Appendix A, p. A5.)

Judge Napoli's opinion then discussed, and refuted, the various arguments advanced by the damage action plaintiffs in support

of their contention that they could recover even if the Civil Aeronautics Board determined that the fares in question were not unjust or unreasonable.

On September 18, 1972, after Judge Napoli's death, the Executive Committee of the District Court reassigned the consolidated damage actions to Judge Hubert Will. On October 5, 1972, Judge Will, after reviewing all of the briefs which had been filed in those actions and considering oral statements by counsel, concluded that there would not be any basis for an award of damages if the Civil Aeronautics Board determined (in its then-pending investigatory proceeding) that the fares in question were not unjust or unreasonable, stating:

> "I don't understand how if they [the Civil Aeronautics Board] just didn't dot the 'i's' and cross the 't's' but nobody got hurt, how there can be any damages."
>
> "I don't think the law redresses the technical imperfections in conduct which don't hurt anybody. * * *"
>
> * * * * *
>
> "I just don't understand how anybody, how a court can adjudicate that somebody who hasn't been hurt should be paid some money because the wrong oven was used in producing a perfectly palatable, healthful product."
>
> * * * * *
>
> "As I read all the material last night, trying to get myself oriented, what struck me was that if in fact it turns out nobody got hurt, I don't see how the law responds to that situation absent some kind of a specific provision penalizing formal failures; but, that wouldn't give the plaintiff litigants the right to enforce that in any event I wouldn't think, particularly if you are going to impose a fine on somebody. You ought to impose it on the CAB."
>
> * * * * *
>
> "And they [the District of Columbia Court of Appeals in *Moss* I] made no determination as to the fairness or reasonableness of those illegally determined rates. They simply said the airlines are collecting rates they haven't been properly authorized to charge."

"Now, we are going to have an adjudication in which, if I understand it correctly, they [the Civil Aeronautics Board] are going to consider the question as to whether or not during that interim period, notwithstanding the formal defects in their adoption, * * * [the fares] were fair and reasonable, whether there is any unjust enrichment on the part of the airlines."

"I have difficulty seeing, as I repeat, how private litigants can say they were hurt if they paid just and reasonable rates simply because those just and reasonable rates were not formally, properly adopted or approved."

"You might do some research on it and see, but it seems to me that is the guts of the case. * * *" Transcript of Proceedings on October 5, 1972, pp. 8, 10, 11-12.

Certain of the damage action plaintiffs continued to assert that they would be entitled to recover damages even if the Board determined that the fares in question were just and reasonable. Consequently, on December 6, 1972, Judge Will requested the parties to submit additional memoranda regarding the question whether damages could be recovered regardless whether the fares were unjust or unreasonable, stating:

"If you have got any other theories, get them in now. I don't see any reason for waiting [to consider such theories] until the Board has determined whether or not the rates are fair and reasonable. If you have got other theories of damages which are not related to that question, you get them in now."

* * * * *

"* * * Assuming the C.A.B. finds the rates to be fair and reasonable, what basis do you have for damages, or am I just going to have a third year law school moot court case in which even if you win you don't get anything except the satisfaction of a finding in your favor; because if there is no basis for monetary recovery, there isn't any point in spending your time and money, and my time and the taxpayers' money, trying the case." Transcript of Proceedings on December 6, 1972, pp. 5-6.

On March 26, 1973, Judge Will, after considering the additional memoranda submitted by the parties pursuant to his

December 6, 1972 request, stated that in his view the plaintiffs had simply repeated the arguments which Judge Napoli had considered and rejected, and had failed to advance any new arguments. He concluded that the plaintiffs had not propounded any theory which would sustain their damage claims if the Board determined that the fares in question were not unjust or unreasonable, and he refused to modify the stay order which Judge Napoli had entered on January 12, 1972.

The Civil Aeronautics Board's investigatory proceeding with respect to the reasonableness of the domestic air passenger fares in question, which commenced in February 1971, was not concluded until July 1973. In that proceeding, Congressman Moss, *et al.* vigorously contested the carriers' contention that the fares were not unjust or unreasonable. Evidentiary hearings were held before an administrative law judge, and the parties subsequently submitted post-hearing briefs to that administrative law judge. Thereafter, on July 3, 1972, the administrative law judge issued his initial decision. He held that the fares in question were not unjust or unreasonable, that the passengers who paid those fares were not overcharged, and that the carriers were not unjustly enriched by collecting those fares. The Board then reviewed that initial decision, as well as the additional briefs which the parties submitted, and heard oral arguments on November 15, 1972. After considering the evidence and the arguments of the parties, the Board issued its decision on July 11, 1973 (Order No. 73-7-39). In that decision, the Board adopted the aforementioned findings and conclusions of the administrative law judge, and held that the domestic air passenger fares in question were not unjust or unreasonable. Congressman Moss, *et al.* appealed the Board's decision to the District of Columbia Court of Appeals, which affirmed that decision on October 16, 1975 in *Moss* v. *Civil Aeronautics Board*, 521 F. 2d 298 (D. C. Cir. 1975) ("*Moss* II"). This Court denied certiorari in *Moss* II on March 22, 1976 (..... U. S. ....., 44 U. S. L. W. 3531, captioned "*Roberts* v.

C. A. B."). The opinion of the District of Columbia Court of Appeals in *Moss* II reviews and analyzes many of the legal principles which are controlling in the instant case; a copy of that opinion is attached hereto as Appendix B.

In July 1973, shortly after the Board issued its decision holding that the fares in question were not unjust or unreasonable, the defendants in the consolidated damage actions moved for summary judgment, seeking dismissal of those actions on the ground that the Board's decision precluded the plaintiffs from recovering any damages. During a status report on September 10, 1973, Judge Will stated to counsel that he was disposed to grant defendants' motion for summary judgment, but at the request of plaintiffs' counsel he continued that motion until December 10, 1973 in order to ascertain what action (if any) had been taken in the interim by the District of Columbia Court of Appeals with respect to the appeal of the Board's July 1973 decision.

On December 10, 1973, Judge Will entered an order dismissing the seven consolidated damage actions. He stated that he was dismissing those actions because they were "moot" or precluded by the holding of the Civil Aeronautics Board, explaining that his decision rested on the premise that because the fares in question had been determined to be neither unjust nor unreasonable, the plaintiffs who paid those fares could not have suffered any legally compensable injury (since they were obligated by law to pay "reasonable" amounts for their air transportation):

> "There have been sounds made that there would still be some sort of cause of action even if the [District of Columbia] Court of Appeals was to affirm [the Board's decision] and the rates were found to be fair and reasonable. I don't know what, because I don't know what damages there could be."
>
> * * * * *
>
> "Well, noises have been made that we could have some sort of compensatory or other damages for the fact that

> the rates were put into effect after an improper procedure before the CAB."
>
> "I don't see how you get any damages, and the Supreme Court has made it very clear that you don't get damages just because the 'i' dotting and the 't' crossing was not correct, if the results were fair and reasonable, and the results have been found to be fair and reasonable at this point."
>
> "I don't understand on what theory you could have damages for the collection of fair and reasonable rates improperly determined."
>
> * * * * *
>
> "* * * I am simply going to dismiss them on the grounds that they are moot, and I am available for a motion to reinstate on any grounds, though the only one I can think of at the moment is that the CAB has been reversed." Transcript of Proceedings on December 10, 1973, pp. 3, 5-6.
>
> "* * * Two years ago there hadn't been a determination by the CAB * * * as to whether or not the rates which were charged were fair and reasonable. You had a determination that the procedure—a judicial determination that the procedure by which these rates had been approved was defective. So the CAB was now back under an appropriate procedure, a proper procedure reexamining the question of reasonableness and fairness."
>
> "Subsequent to that two things have happened. The CAB has adjudicated and found that the rates were fair and reasonable, and now there has been an appeal taken to the Court of Appeals for the District of Columbia."
>
> "So there are two things that are changed. One, you have a determination by the administrative body charged with the responsibility which the courts keep talking about having special knowledge and expertise, et cetera, like the I.C.C., that the rates were fair and reasonable, which would moot the case, subject to a reversal by the Court of Appeals which would unmoot the case."
>
> "I said if they get unmooted, I will reinstate them, but there isn't any point in keeping on the docket seven cases which have a high probability of never having any vitality

when you can resuscitate them very easily. In the event the Court of Appeals reverses we will put them back on the docket and go from there: but if the Court of Appeals affirms, as it is highly probable it will, then these cases are moot." Transcript of Proceedings on December 20, 1973, pp. 3-4.

"* * * there is no damage because if these improperly adopted fares are subsequently determined to be fair and reasonable, then I don't know what there is left to litigate, except to give it to some law school moot court, or put it on an examination; but, there is nothing more useless than litigating issues from which there can be no recovery in the nature of damages or other relief."

"So, the fact that the * * * [CAB] has now found these fares to be reasonable, and that is now on appeal, seems to me means that these cases will all be moot. They are moot at this point unless that determination is reversed. Since they are moot, I have dismissed them with the understanding that I will reinstate them [if the decision of the Civil Aeronautics Board is reversed on appeal]; * * *." Transcript of Proceedings on January 14, 1974, p. 5.

As noted above, the named plaintiffs in four of the seven consolidated damage actions (including the instant case) appealed Judge Will's decision to the Court of Appeals for the Seventh Circuit. On December 8, 1975, that Court unanimously affirmed Judge Will's decision dismissing the consolidated damage actions. In its opinion, the Seventh Circuit pointed out that many of the substantive legal issues raised by the appeal before it had already been decided by the Court of Appeals for the District of Columbia Circuit in *Moss* II, and stated "We think that *Moss* II clearly and correctly explicates the earlier decision [*Moss* I] and establishes that the C. A. B. order attacked in *Moss* I was voidable rather than void" (526 F. 2d at 760). The Seventh Circuit went on to conclude that the District Court had properly dismissed the consolidated damage actions because the plaintiffs had not been injured by paying the domestic air passenger fares in question, and therefore they were precluded from recovering money damages by "the fundamental legal premise

that mere illegality which causes no injury is not ordinarily compensable" (526 F. 2d at 760). The Seventh Circuit also held that it did not have to decide whether Judge Will had properly used the term "moot" to describe that situation, because in any event his dismissal order could be treated as a Rule 56(b) summary judgment in favor of the defendants; as the Court of Appeals pointed out (526 F. 2d at 761-762 and fn. 2), there was no genuine issue as to any material fact, and the defendants therefore were entitled to summary judgment of dismissal as a matter of law because they were not unjustly enriched by collecting the fares in question, so that restitution was inappropriate.

Petitioners then filed their petition for a writ of certiorari in this Court, challenging the decision of the Seventh Circuit. As noted above, none of the named plaintiffs in the other three damage actions which were encompassed by that decision have sought review in this Court.

ARGUMENT

Petitioners assert that this Court should review the decision of the Seventh Circuit Court of Appeals because that decision purportedly "has, in effect, decided a federal question in a way in conflict with applicable decisions of this Court" (Pet. p. 5). But nothing could be further from the truth. In fact, the decision of the Seventh Circuit (like the decision of the District of Columbia Court of Appeals in *Moss* II), is expressly premised upon, and carefully follows the teachings of, this Court's decisions in two cases which are remarkably similar to the instant case—*Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301 (1935), and *U. S.* v. *Morgan*, 307 U. S. 183 (1939). In those cases, this Court enunciated the principle that where an administrative agency has committed a procedural error in establishing rates, persons who paid those rates can obtain restitution only if that remedy is necessary to prevent unjust enrichment—which could not occur unless the rates in question were "unjust" or

"unreasonable." That controlling rule of law, of course, is the very cornerstone of both the Seventh Circuit decision below and the decision of the District of Columbia Court of Appeals in *Moss* II.

In the *Atlantic Coast Line* case, plaintiffs sought restitution of sums which the defendant railroads had collected pursuant to an I. C. C. order that subsequently was set aside because the Commission's factual findings had been inadequate.* This Court denied restitution, holding that such relief would be appropriate only if the freight rates which the railroad had charged under the later-invalidated I. C. C. order were "unreasonable", so that the railroad would be "unjustly enriched" if it were permitted to retain the amounts which it had collected. Justice Cardozo, speaking for the Court, stated that the plaintiffs could obtain restitution only if they could "show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it" (295 U. S. at 309). This Court's opinion went on to conclude that it would be unjust to punish the railroad for the Commission's procedural error in establishing the questioned rates unless it had been "unjustly enriched" by collecting the amounts in question, and that it was appropriate for the I. C. C. to determine *post hoc* whether such "unjust enrichment" had occurred (even though the Commission had no power to grant reparations) (295 U. S. at 312-314).**

* Petitioners seek restitution of money "had and received" in the instant case. Their theory of liability thus is identical with the theory of liability relied on by the plaintiffs in *Atlantic Coast Line.*

** This Court's opinion in *Atlantic Coast Line* also emphasized the fact that the defendant railroad was *legally required* to collect the questioned fares, even though the I. C. C. order imposing those fares subsequently was set aside on the ground that it was not supported by adequate findings of fact (295 U. S. at 311). Similarly here, the air passenger tariffs which the carriers filed in October 1969, pursuant to the Civil Aeronautics Board's September 12, 1969 order, were legal, valid and binding until the Board's order was reversed by the Court of Appeals for the District of Columbia in July 1970. *Until the October 1969 tariffs were thus invalidated, the defendant air carriers were legally required to charge the fares*

(Continued on next page)

This Court expanded upon the *Atlantic Coast Line* principles in *Morgan,* which involved the action of the Secretary of Agriculture in prescribing new, lower rates for services rendered in the Kansas City stockyards. The plaintiff stockyard operators contended that the new rates were invalid because the Secretary had promulgated those rates *without a full hearing.* Pending judicial determination of the validity of the Secretary's action, the sums representing the difference between the old rates and the new ones were placed in an escrow fund established by the District Court. This Court sustained plaintiffs' challenge to the new rates, holding that the entry of the Secretary's order without a full hearing was a denial of the "requirements of fairness which are the essence of due process" (*Morgan* v. *United States,* 304 U. S. 1, 19 (1938)). On remand, the District Court held that by virtue of this Court's decision the plaintiff stockyard operators were automatically entitled to restitution of all of the money which had been placed in the escrow fund during the pendency of the litigation. But when the case was appealed for the second time, this Court held that the stockyard operators could recover only that portion of the escrow fund which the Secretary determined to have been collected pursuant to rates that were not unreasonably high. In reaching that result, this Court concluded that the District Court had erred in failing to apply the "unjust enrichment" test promulgated in *Atlantic Coast Line,* and that the Secretary of Agriculture had the power to determine the reasonableness of the rates charged during the prior period (307 U. S. at 195-198).

Petitioners contend that *Atlantic Coast Line* is not relevant here because the I. C. C. order involved there was invalidated because of the inadequacy of the Commission's findings—which, according to petitioners, did not constitute a violation of "due

(Continued from preceding page)

specified in those tariffs, because 49 U. S. C. § 1373(b) provides that "No air carrier * * * shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs * * *."

process" comparable to that which allegedly occurred when the Civil Aeronautics Board entered its September 12, 1969 order (Pet. pp. 6-8). But it is clear from the *Atlantic Coast Line* opinion that this Court's decision there was not affected in any way by the *reason* for the invalidity of the questioned I. C. C. order. Furthermore, the petition here does not even mention the *Morgan* case, where this Court held that the principles enunciated in *Atlantic Coast Line* were applicable as grounds for denying restitution even though the Secretary of Agriculture had established new rates without a full hearing, in a manner which this Court had characterized as a denial of the "requirements of fairness which are the essence of due process" (304 U. S. 1, 19).*

Petitioners assert that "this entire case turns upon one question of law"— namely, whether the Civil Aeronautics Board's September 12, 1969 order was merely voidable (as the Court of Appeals held), or was void *ab initio* (Pet. pp. 9-10). Their theory is that the decision of the District of Columbia Court of Appeals in *Moss* I (430 F. 2d 891) retroactively voided that Board order and the October 1969 tariffs established pursuant thereto, thereby reinstating the prior tariffs and entitling petitioners to recover all amounts which they paid for domestic air transportation in excess of the amounts specified in those prior tariffs.** This Court, however, rejected that "void *ab*

* Moreover, although petitioners assert that "the denial of a hearing granted by statute is a denial of due process of law" (Pet. p. 6), that principle applies only where persons subject to quasi-judicial action were deprived of hearing rights in conjunction with decisions that impinged upon their individual interests. Questions regarding public participation in rate-making proceedings, on the other hand, are not of constitutional significance. Professor Davis affirms this long-established principle, on the basis of numerous well-known decisions, in his *Administrative Law Treatise*, § 7.06; *see also*, §§ 7.01, 7.02, 7.04 and 7.20 thereof, particularly § 7.04.

** This "void *ab initio*" argument is advanced by petitioners in reliance upon *Moss* I, even though the District of Columbia Court of Appeals clearly explained in *Moss* II that its opinion in *Moss* I could not properly afford any basis for such an argument. *See*, 521 F. 2d 307-309, 314-315; Appendix B, pp. A27 through A31, A42.

initio" theory in *Atlantic Coast Line* and again in *Morgan*. In *Atlantic Coast Line*, this Court held expressly that the I. C. C.'s failure to make adequate findings in support of its order did *not* render that order void *ab initio* (295 U. S. at 311). Similarly in *Morgan*, this Court held that the Secretary of Agriculture's later-invalidated order was voidable, rather than void, stating:

> "* * * There [in *Atlantic Coast Line*], as here, * * * the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative order was not a nullity. * * * Though voidable, it could not be ignored." (307 U. S. at 195-196).

And, as noted above, this Court reached that conclusion in *Morgan* despite the fact that the "first administrative order" in question there had been entered without a full hearing, under circumstances which this Court characterized as a denial of the "requirements of fairness which are the essence of due process".

Thus it is clear that the "one question of law" propounded by petitioners has been answered unequivocally by the controlling decisions of this Court, and that the Civil Aeronautics Board's September 12, 1969 order was not "void *ab initio*", but rather was merely voidable. That fact is unquestionably dispositive here, because even petitioners have conceded that if that order was merely voidable, the Board's subsequent "findings related to reasonableness and equity [of the fares in question] * * * would be controlling" (Pet. p. 10).

In an attempt to avoid the effect of *Atlantic Coast Line* and *Morgan*, petitioners contend that the decision in this case should be governed by *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956) (Pet. pp. 6-7). Petitioners, however, have failed to disclose several critical facts which render that decision totally inapposite here. *United Gas Pipe Line Co.* was decided under the Natural Gas Act, and the rate pro-

visions of that statute are substantially different from the rate provisions of the Federal Aviation Act, because the Natural Gas Act contemplates private rate agreements rather than tariffs which establish uniform rates for all customers (shippers and passengers). In *United Gas Pipe Line Co.* this Court held simply that a natural gas company could not unilaterally change the terms of its contract to furnish gas to a distributing company, merely by filing with the Federal Power Commission a schedule calling for rates higher than those specified in the contract. Accordingly, this Court's decision permitting the distributing company to recover the amounts which it had paid in excess of the contractual rates manifestly does not support petitioners' contention that they are entitled to restitution even though they suffered no injury by paying the fares in question (and the defendant air carriers were not unjustly enriched by collecting those fares). The other cases cited in the Petition are similarly inapposite, and need not even be discussed here. It suffices to say that *none* of the cases cited by petitioners involved a situation where an administrative agency rate order was set aside on procedural grounds, and subsequent corrective hearings held by that administrative agency established that the rates imposed pursuant to the procedurally defective order were just and reasonable.

Finally, petitioners contend that it was inappropriate for the District Court to rely on the determination by the Civil Aeronautics Board that the fares were not unjust or unreasonable (Pet. p. 9). That contention, however, is refuted by *Atlantic Coast Line* (where this Court held expressly that the I. C. C. had the power to determine whether the rates charged pursuant to its later-invalidated order had been just and reasonable) and by *Morgan* (where this Court held that the plaintiffs' right to recover the sums held in the escrow fund established by the District Court depended upon a determination by the Secretary of Agriculture as to whether the old rates had been unreasonably high). Moreover, the Civil Aeronautics Board determined the

reasonableness of the fares at issue here in a proceeding which it instituted in response to a complaint filed by Congressman Moss, *et al.* shortly after the District of Columbia Court of Appeals announced its decision in *Moss* I reversing the Board's September 12, 1969 order and remanding the matter to the Board "for further proceedings"; the Board's determination that those fares were not unjust or unreasonable subsequently was affirmed by that same Court of Appeals in *Moss* II. Clearly, then, it was appropriate for the District Court to rely on the Board's determination as to the reasonableness of the fares in question, because that unquestionably is a matter within the Board's exclusive primary jurisdiction (for the reasons established by a long line of this Court's decisions, beginning with *Texas & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), and summarized in such cases as *Far East Conference* v. *United States*, 342 U. S. 570, 574-75 (1952), and *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63-64 (1956)).

CONCLUSION

Thus it is clear that the decision of the Court of Appeals for the Seventh Circuit is in complete accord with the controlling principles of law established by this Court's prior decisions, and is not in any way inconsistent with those decisions or in conflict with the decision of any other Court of Appeals. The Seventh Circuit in its decision below, the District of Columbia Court of Appeals in *Moss* II, Judge Napoli in his decision staying the consolidated damage actions pending further proceedings before the Civil Aeronautics Board, and Judge Will in his order dismissing these actions, agreed unanimously as to the legal principles controlling here—principles long established by this Court's directly relevant decisions in *Morgan* and *Atlantic Coast Line*. Moreover, petitioners have failed to demonstrate any other reason why this Court should exercise its discretionary powers to

review the decision of the Seventh Circuit. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted,

H. TEMPLETON BROWN,
BRYSON P. BURNHAM,
LEE N. ABRAMS,
STEPHEN M. SHAPIRO,
Attorneys for Respondents American Airlines, Inc. and Trans World Airlines, Inc.

MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
312—ST2-0600,
Of Counsel.

April 6, 1976.

APPENDIX A.

UNITED STATES DISTRICT COURT,
N. D. Illinois, E. D.

Jan. 12, 1972.

ALAN WEIDBERG, et al.,
Plaintiffs,

vs.

AMERICAN AIRLINES, INC., et al.,
Defendants.

No. 70 C 1879 and Related Cases.

MEMORANDUM OPINION AND ORDER.

NAPOLI, *District Judge.*

This Multidistrict Litigation was transferred to this court for consolidated pretrial proceedings by the Judicial Panel on Multidistrict Litigation pursuant to 28 U. S. C. § 1407(a), In re Air Fare Litigation, 322 F. Supp. 1013 (1971). The Panel realized that the seven actions which were filed in the wake of the decision of the Court of Appeals for the District of Columbia in *Moss* v. *Civil Aeronautics Board,* 139 U. S. App. D. C. 150, 430 F. 2d 891 (1970) presented our federal judiciary with the problem of conflicting and overlapping class actions. Under these circumstances the Panel held that common questions of fact existed justifying a transfer under § 1407 in regard to the problem of the makeup, potential overlapping and damages to

the purported classes. Therefore, five actions pending in districts other than the Northern District of Illinois were transferred to this district, considered by the Panel to be the most convenient for all concerned, and have been consolidated with the two actions currently pending before this court.

The factual situation involved in this litigation is most thoroughly recited in the *Moss* opinion at 430 F. 2d 891. Hence this court will only summarize those facts which are necessary for an understanding of the issues currently before the court. Under the Federal Aviation Act of 1958, 49 U. S. C. § 1301 *et seq.* (1970), the air carriers must file with the Civil Aeronautics Board (hereinafter C. A. B. or Board) and keep open to public inspection tariffs showing their fares for air transportation; § 1373(a). The carriers are prohibited from charging or collecting any compensation which varies from the tariffs on file or from granting rebates or refunds therefrom, with certain exceptions not applicable here; § 1373(b). The carriers may change the tariffs by filing with the Board and posting amended tariffs thirty days before their effective date; § 1373(c). However, the C. A. B. itself is authorized to prescribe a lawful rate to be charged when it is of the opinion that the present rate is unjust or unreasonable, or unjustly discriminatory, preferential, or prejudicial; § 1482(d). It must, however, give notice and conduct a hearing before exercising this power. Subsection (e) of § 1482 enumerates the substantive standards the Board is directed to consider in determining rates and subsection (g) empowers it to suspend any newly filed tariff, pending a hearing regarding the tariff's lawfulness, if it provides the affected carrier with a statement of reasons therefor.

Petitioners in *Moss,* some 32 Congressmen, had complained to the C. A. B. concerning its practice of holding ex parte meetings with representatives of the carriers. Despite these complaints, the meetings ripened into new tariffs increasing passenger fares which were filed by 20 of the main domestic air carriers in August of 1969.

On September 12, 1969, the Board issued Order 69-9-68, docket 21322 which suspended the carriers' tariffs under § 1482 (g) on the grounds that said tariffs "may be unjust [or] unreasonable." The Order further found that the carriers were in need of additional revenue due to increased expenses and proposed its own fare formula, which would in effect grant a revenue increase of 6.35%, and announced that such tariffs would be acceptable without suspension. Predictably, the carriers withdrew their suspended tariffs and filed new tariffs in accordance with the C. A. B.'s formula all of which became effective on or by October 15, 1969.

A petition for review of the C. A. B.'s order was filed in the Court of Appeals for the District of Columbia by the *Moss* petitioners which resulted in that court holding that the October 1969 tariffs filed by the carriers actually constituted rate making by the Board under § 1482(d) and that as such the C. A. B.'s order and rates were invalid and unlawful for failure to comply with that section's notice and hearing provisions. The court remanded the case to the C. A. B. for further proceedings. Also, the *Moss* petitioners filed a supplemental complaint with the Board asking that it conduct a proceeding to determine the appropriate relief for the carriers' customers who paid the now unlawful fares. An investigation entitled "Reasonableness of Passenger Fares charged by Domestic Trunkline and Local Service Carriers from October 1, 1969, through October 14, 1970", was initiated by the Board's Order 71-2-109, docket 23140 in response to these events.

Following the *Moss* decision, these seven lawsuits were filed, as hereinbefore mentioned, each claiming to represent the class, or a part thereof, of the public who paid the alleged overcharges as a result of the unlawful fares. Following their transfer to this court, the air carrier defendants have moved to stay the proceedings herein, pending completion of the C. A. B. investigation. In support of this motion, defendants assert that the only possible claim for relief of plaintiffs, if any, is upon the

theory of unjust enrichment which depends upon the reasonableness *vel non* of the unlawful fares. They also assert that the issue of reasonableness is the central facet of this case because the Federal Aviation Act (hereinafter "Act") makes the implied standards for fares or rates that of justness and reasonableness, as well as the fact that the carriers are undoubtedly entitled to a reasonable rate of return for their services. Further, they claim that the question of the reasonableness of the fares is a matter within the primary jurisdiction of the C. A. B., hence these proceedings should be stayed. Plaintiffs in opposition state that their theory of recovery is not necessarily unjust enrichment, making the question of reasonableness immaterial and their claim for relief is independent of the Act. They also assert that the C. A. B. has no jurisdiction, primary or otherwise, over this cause as the issues are questions of law, not fact; that the C. A. B. has no power to conduct investigations or determine retroactively, reasonableness of fares; and that it has no power to award reparations. Finally, plaintiffs charge that the only currently effective tariffs the carriers could charge under § 1373(b) were the original tariffs on file before the carriers filed their new tariffs in August 1969. Consequently, plaintiffs believe themselves to be entitled to recover without consideration of the reasonableness of the unlawful fares.

The decisions in the field of administrative law overwhelmingly support the proposition that if the issue in controversy involves the reasonableness of fares, then that question falls within the primary jurisdiction of the appropriate administrative agency and this court should defer to such agency for the initial determination. See, *e.g.*, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed 2d 553 (1907); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 71 S. Ct. 692, 95 L. Ed. 912 (1951); *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622 (2nd Cir. 1950); *Lichten* v. *Eastern Airlines*, 189 F. 2d 939 (2nd Cir., 1951); and *Tishman & Lipp, Inc.* v.

Delta Airlines, 275 F. Supp. 471 (S. D. N. Y. 1967), affirmed 413 F. 2d 1401 (2nd Cir. 1969). The doctrine of primary jurisdiction serves as a flexible guide for the courts in determining whether it will be more efficacious for the judiciary or an administrative body to make the initial determination of the question in issue. Therefore it is not technically a question of "jurisdiction" but rather a matter of judicial self restraint in conformance with comity and a healthy respect for the statutory authority of the administrative agency. The rationale of the doctrine is a recognition of the need for an orderly coordination of work between the judiciary and administrative bodies for the reason that those bodies can apply their knowledge or expertise to the question and thereby aid the court by laying a foundation for a more intelligent disposition of the question as well as insuring uniformity of result. See, Davis, Administrative Law Treatise (West Publishing Co. 1958) § 19.01 *et seq.* As such, this court believes that a stay in proceedings while this cause is referred to the C. A. B. would be a matter within its sound discretion. *Ratner* v. *Chemical Bank New York Trust Co.*, 309 F. Supp. 983 (S. D. N. Y. 1970).

Since the question of the reasonableness *vel non* of the fares falls within the primary jurisdiction of the C. A. B., the plaintiffs in order to avoid a stay must proceed on the theory either that they have a claim for relief independent of unjust enrichment, which would rest upon common-law or statutory construction, or that they are absolutely entitled to recover due to the declaration of unlawfulness by the *Moss* court. At the expense of lengthening this opinion the court will turn to and examine the pertinent authorities and arguments of the respective parties on these issues.

The case which presents the most factual similarity to this litigation is *Atlantic Coast Line R. R. Co.* v. *Florida*, 295 U. S. 301, 55 S. Ct. 713, 79 L. Ed 1451 (1935) and is cited by defendants for the proposition that the only theory of recovery is unjust enrichment. In *Atlantic Coast* the carrier collected a

higher set of rates which had been prescribed by order of the Interstate Commerce Commission upon its finding that the original rates were unjustly discriminatory. Previously the Supreme Court held that the ICC's order was unlawful for want of complete and adequate findings of fact. New findings were subsequently made, supporting the same schedule of rates, and were upheld by the high Court. Various shippers and the State of Florida sued to recover the increase in rates collected before the rate schedule was supported by valid findings.

Mr. Justice Cardozo for the Court considered the action to be one for money had and received which is founded in equity, and analogized with an action to recover a satisfaction of judgment which is later reversed. It was stated:

> The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. (Citations omitted). The question no longer is whether the law will put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he had been able to collect it.
>
> 295 U. S., at 309-310, 55 S. Ct., at 716-717.

In this type of situation, Cardozo applied the test as follows:

> To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings.
>
> 295 U. S., at 314, 55 S. Ct., at 718.

Thus *Atlantic Coast* does not adopt any rigid formula for recovery; rather the equities of the cause as set forth in the context of the factual circumstances will serve as the polestar for a court of equity in reaching a decision. In that case, restitution was ultimately denied due to the inequity of the shippers' position, in that the original rates were so unreasonably low as to

be confiscatory. The decisive element in the Court's weighing of the respective equities appears to have been the reasonableness of the schedule of rates. Supporting this interpretation is Cardozo's statement in reversing the decree of the district court that:

> The claimants do not sustain the burden that is theirs by showing that the master set up a reasonable schedule [allowing partial restitution to the shippers]. They must show that the other schedule, the one set up by the [Interstate Commerce] Commission, is unreasonable. In the absence of such a showing the carrier does not offend against equity and good conscience in standing on its possession and keeping what it got.
>
> 295 U. S., at 318, 55 S. Ct., at 720.

This court believes with only the possible reservation to be mentioned infra that the last quoted passage from *Atlantic Coast* is a more accurate description of the holding in that case than to say that plaintiffs must proceed upon the theory of unjust enrichment. Defendants can not impose their theory of recovery upon the plaintiffs' claim for relief; however, the court agrees that there is considerable merit in the position that in weighing the equities of this case, the question of the reasonableness of the fares will play an important or even decisive role. Paraphrasing Cardozo, in order for plaintiffs to prevail it must appear that the equities are so in favor of the plaintiffs that this court is duty bound to make the air carriers pay a considerable sum as reparations for the blunder of the C. A. B. There is no question that the air carriers have the right to seek increased fares, subject to the suspension power of the C. A. B. The *Moss* court found the fares to be unlawful not because they were unjust or unreasonable, or that they violated the substantive rate making factors contained within § 1482(e) as plaintiffs claim, but rather for the reason that the C. A. B. failed to give notice and conduct a hearing in prescribing rates under § 1482(d). Despite the scathing criticism of the C. A. B. by the *Moss*

court, this court's reading of the *Moss* opinion leads it to the conclusion that the defect in the administrative proceeding was of a procedural nature. Thus, the question of the reasonableness *vel non* of the unlawful fares becomes particularly appropriate in weighing the equities of the respective parties.

If a determination of unreasonableness is made, coupled with the *Moss* court's decision holding the C. A. B.'s order and its fares invalid then there is a basis for finding that the retention by the air carriers of the increase of the fares would violate equity and good conscience. The Act implies that fares should be just and reasonable, as well as not discriminatory, prejudicial or preferential. If the fares are found to be reasonable, on the other hand, then the only equity on plaintiffs' side is the procedural defect committed by the C. A. B. Since the Act allows reasonable fares and it can not be doubted that the carriers are entitled to a reasonable rate of return, plaintiffs would have a weak case if the fares were reasonable and just. Another factor to be weighed in this regard is the admonition of § 1373(b) against a carrier charging any fare other "than the rates, fares, and charges specified in its currently effective tariffs." The carriers had no way of determining that the C. A. B.'s order and their fares would be invalidated by the *Moss* court. They take the position that it was their statutory obligation to charge the fares filed with the Board but subsequently found to be defective. Plaintiffs counter with the argument that the *Moss* court's decision voided these fares *ab initio*. Since the tariffs filed by the carriers and suspended by the C. A. B. had thereupon been withdrawn by the carriers, the only remaining tariffs which could possibly be the currently effective tariffs were the original, pre-October 1969 tariffs which the carriers sought to increase. The plaintiffs then conclude that § 1373(b) forbade the carriers from charging any but the 1969 fares and that they are ipso facto entitled to restitution for violation of the statute. Mr. Justice Cardozo dealt with a similar issue in *Atlantic Coast* and held that an order of an administrative body found to be void for a procedural defect is only voidable, and he further stated:

> The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path. . . . Obedience was owing while the order was in force.
>
> 295 U. S., at 311, 55 S. Ct., at 717.

This court believes that the same is true under the Act in question in this case. *Lichten* v. *Eastern Airlines, supra.* The tariffs filed with the Board but subsequently found to be unlawful were voidable due to the C. A. B.'s error; until a court of proper jurisdiction declared them to be unlawful, however, they were the only tariffs which were on file with the C. A. B. and were the only "currently effective" tariffs. Any other result would create chaos and destroy the purpose of the Act: uniformity of treatment. A contrary holding would allow or compel a carrier to charge a fare at variance with its filed tariffs on the pretext that it may be procedurally defective. Under such a situation, plaintiffs' construction of § 1373(b) would in fact undermine and destroy the very purpose of that section. Therefore, this court believes that until an order or tariff of the C. A. B. has been administratively or judicially overturned the carriers are bound by it. See, *Alco-Gravure Div. of Publications Corp.* v. *American Airlines*, 173 F. Supp. 752 (D. Maryland 1959).

Of course, the respective equities will depend upon the entire circumstances of the case, of which the question of reasonableness is but one, albeit an important factor to be considered.

As was mentioned earlier in this opinion, the question of the reasonableness of any fare or tariff is within the primary jurisdiction of the appropriate administrative agency. See, *e.g. Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co., supra.* The rationale for this doctrine was said to be in the *Abilene* case the policy of the statute providing for uniformity of treatment. It was thought that such uniformity would be impossible if individual courts were free to pass on the question of reasonableness—the

spectre of different juries reaching conflicting results was sufficient to lead the court to decline involvement in the question in favor of the administrative bodies.

Thus far this opinion has mainly relied upon cases decided under the Interstate Commerce Act. Since this case will turn on another statute, the Federal Aviation Act, it is appropriate to consider whether this analysis will change under the different act.

The case of *Lichten* v. *Eastern Airlines*, 189 F. 2d 939 (2nd Cir. 1951) is one of the more prominent cases decided under the Federal Aviation Act dealing with primary jurisdiction. There, the reasonableness of a tariff containing an exculpatory clause was challenged. In holding that the question was one properly for the C. A. B. to handle rather than the court, the court cited *Abilene* and emphasized the necessity for uniformity of decisions on the question. In *C. A. B.* v. *Modern Air Transport, supra*, it was also held that the question of reasonableness is within the primary jurisdiction of the Board, but in that case the court held that it could interpret the C. A. B.'s regulations and determine whether or not there had been a violation thereof. See, also *Tishman & Lipp, Inc.* v. *Delta Airlines, supra*, and *Furrow & Co.* v. *American Airlines*, 102 F. Supp. 808 (W. D. Okla. 1952). It should also be noted that the decision in *Atlantic Coast* dealt with the theory of recovery when an administrative body has committed procedural error and was not limited to interpreting or depending upon the Interstate Commerce Act. Therefore, the court believes that opinion sufficiently broad in scope to be applicable to the case at bar.

One problem is presented by two Supreme Court decisions. In *Abilene* and *T. I. M. E., Inc.* v. *United States*, 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959) it was held for different reasons that a court had no power to hear a claim for reparations which was based upon a challenge to the reasonableness of tariffs. *Abilene* was decided under Part I of the Interstate Commerce Act which provides for the award by the I. C. C.

of reparations and for private cause of action for violation of its terms. The court held, despite a broad savings clause, that a common-law cause of action would be "absolutely inconsistent" with the purpose of the Act, which is to insure uniformity of rates, and is abrogated by the statutory remedy. *T. I. M. E.* was decided under the Motor Carriers portion of the Interstate Commerce Act which at that time did not provide for reparations to be awarded by the administrative agency nor for a private cause of action, which in this respect is similar to the Federal Aviation Act. That court refused to imply a statutory action and further held that the absence of a reparation provision within the Act was indicative of a Congressional intent to abrogate any claims for relief including those at common-law. Thus, if an analogy can be drawn between the Federal Aviation Act and these portions of the Interstate Commerce Act, no claim for relief may exist. However, it is not appropriate at this time to reach a decision on this question. The investigation of the C. A. B. into the question of the reasonableness of fares in question may render moot this difficult problem. Also, the factual situations and statutes involved in these two cases are different from those in this litigation and the cases may not be applicable. Therefore, this court believes that the most expeditious and efficient course of action for this litigation would be to by-pass this problem, which counsel have not dealt with in depth in their respective memoranda, since it is an issue collateral to the motion currently before the court, until a determination of the reasonableness *vel non* of the fares has been made.

While the main arguments of the plaintiffs have been considered and dealt with earlier in this opinion, the court will briefly comment on their remaining issues. Certain plaintiffs attempt to distinguish the *Atlantic Coast* decision from *Moss* on the ground that the defect in the former was procedural while in the latter it was a violation of the substantive rate making standards contained within the statute. This court can not agree and reads *Moss* as invalidating the order and fares of

the C. A. B. on the grounds that the second tariffs filed by the carriers in response to the C. A. B.'s suggested formula constituted rate making by the Board. As such, a hearing after due notice was required by the statute and, as admitted by the C. A. B., was not held. Basically, for the reasons that judicial review was in this manner frustrated and that the public was effectively excluded from the decision making process, the *Moss* court overturned the increased fares. This, in the court's opinion, was a procedural defect, and it believes that the quotations of plaintiffs are taken out of the full context of the *Moss* opinion.

Also, plaintiffs contend that the C. A. B. has no power to grant reparations or to investigate into the past unreasonableness of a tariff. While the first statement is certainly true, it does not follow that any action or investigation of the C. A. B. must prove to be futile for that reason. The doctrine of primary jurisdiction is predicated upon the rationale of the administrative agency laying a foundation for a more informed decision by the court. Therefore, power to issue a final order adjudicating the claims or granting relief on the part of the agency is not necessary before a question can be referred to such an agency. The Act also grants general investigatory powers to the Board and the *Atlantic Coast* decision supports the theory that the agency may conduct an investigation in these circumstances.

Plaintiffs cite the cases of *I. C. C.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913) and *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451 (1918). The court finds that these cases are inapplicable for the reason that in those instances the appropriate administrative agency had prior to the litigation considered the reasonableness of the tariffs. The first case stands only for the proposition that the findings of the I. C. C. are *prima facie* correct rather than conclusive. The latter case held that the party who was charged excessive freight charges was damaged despite the possibility that it may

have passed on the overpayments to its customers. Finally, the case of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373 (1956) is also distinguishable since it was decided under the entirely different statutory rate making scheme of the Natural Gas Act.

Finally, the court notes that the origin of this litigation arose with the C. A. B. and the Court of Appeals for the District of Columbia. That Court reversed the order of the Board and remanded to the Board for further proceedings. In response to that remand and the supplemental complaint of the *Moss* petitioners, the C. A. B. initiated its present investigation. For this court to enjoin this investigation as plaintiffs have requested or to conduct an independent and duplicative determination of the same or similar question as being considered by the Board would, in effect, be an infringement upon the jurisdiction of the Court of Appeals for the District of Columbia. This court is unaware of any precedent granting to a district court the power to interfere with the orders or mandate of a Court of Appeals of another circuit.

Accordingly, the defendants' motion for a stay is granted and all proceedings in this litigation are ordered to be held in abeyance until further order of this court. The purpose of this stay is to await the findings of the C. A. B. on the question of the reasonableness *vel non* of the fares charged between October 1969 and October 1970. The parties are expected to aid such investigation and are urged to participate therein. The court also expects liaison counsel for the plaintiffs and defendants to periodically inform the court as to the progress of those proceedings.

It is so ordered.

APPENDIX B.

UNITED STATES COURT OF APPEALS,
District of Columbia Circuit.

Nos. 73-1772, 73-1790.

Oct. 16, 1975.

JOHN E. MOSS *et al.*,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

NORTHWEST AIRLINES, INC., AMERICAN AIRLINES, INC., TRANS WORLD AIRLINES, INC., CONTINENTAL AIR LINES, INC., EASTERN AIR LINES, INC., DELTA AIR LINES, INC., KEITH ROBERTS, ALLEGHENY AIRLINES, INC., AND NORTH CENTRAL AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIR LINES, INC., HUGHES AIRWEST *et al.*, BRANIFF AIRWAYS, INC., AND NATIONAL AIRLINES, INC., INTERVENORS.

KEITH ROBERTS,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AMERICAN AIRLINES, INC., NORTHWEST AIRLINES, INC., CONTINENTAL AIR LINES, INC., EASTERN AIR LINES, INC., DELTA AIR LINES, INC., ALLEGHENY AIRLINES, INC., AND NORTH CENTRAL AIRLINES, INC., UNITED AIR LINES, INC., HUGHES AIRWEST, FRONTIER, *et al.*, TRANS WORLD AIRLINES, INC., NATIONAL AIRLINES, INC., AND BRANIFF AIRWAYS, INC., INTERVENORS.

Before J. EDWARD LUMBARD, Senior Circuit Judge for the Second Circuit, and MCGOWAN and ROBINSON, Circuit Judges.

MCGOWAN, *Circuit Judge*:

This case comes in the aftermath of *Moss* v. *CAB*, 139 U. S. App. D. C. 150, 430 F. 2d 891 (1970), which invalidated certain airline passenger fares made effective by the Civil Aeronautics Board in violation of Section 1002 of the Federal Aviation Act. 49 U. S. C. § 1482 (1970). The question now is whether there is to be a recovery of any part of those unlawful fares. The Board has denied such relief on the grounds that the fares in question were not unjust or unreasonable, and, in any case, resulted in no unjust enrichment of the airlines. We conclude that these decisional principles are determinative, and that they were correctly applied. Accordingly, we affirm.[1]

I.

The history of this case is quite involved, and may best be set out chronologically:

> *August 20, 1969*. Petitioners Moss, et al., requested the Board to suspend a number of proposed fare increases claimed by the airlines to be necessary to offset sharp inflation in their costs and decline in their revenues. Petitioners called at the same time for a rulemaking proceeding in which the Board would undertake a general review of its ratemaking practices.

1. Two petitions for review of the same Board order have been consolidated. The first, No. 73-1772, was filed by Congressman John E. Moss and some twenty-four colleagues. It is they who instituted the Board proceedings culminating in the challenged order, as it was they (or a similar group) who secured the ruling of this court in *Moss I*. The second petition, No. 73-1790, was filed by Keith Roberts, a plaintiff in one of several district court suits filed after *Moss I*, in which relief was sought directly against the airlines. Those suits having been continued pending the outcome of the Board proceedings, petitioner Roberts successfully sought to intervene before the Board. In addition to filing his own review petition in this court, Roberts has also intervened in No. 73-1772. Some fourteen airlines have intervened in both appeals, urging that the Board be upheld.

September 12, 1969. The Board issued Order 69-9-68, in which it suspended the proposed rates. Recognizing an urgent need for some additional revenue, however, the Board in the same order identified a formula by which the airlines could compute rate increases that would not be suspended. Rate increases of approximately six percent, as contemplated by the formula, were filed and became effective as of October 1, 1969.

January 29, 1970. The Board instituted its Domestic Passenger Fare Investigation, a broad inquiry into various aspects of airline ratemaking. The *DPFI* was later divided into nine separate phases: (1) aircraft depreciation; (2) leased aircraft; (3) deferred federal income taxes; (4) joint fares; (5) discount fares; (6) seating configurations and load factors (subsequently made the subjects of separate phases 6A and 6B, respectively); (7) fare levels; (8) rate of return; and (9) fare structure.

June 19, 1970. The Board announced its intention to allow the airlines to "round up" their October 1, 1969 fares to the nearest dollar. The increase took effect July 1, 1970, and yielded some $50 million in additional airline revenues.

July 9, 1970. This court rendered its decision in *Moss I*, invalidating Order 69-9-68 and holding unlawful the fares computed and charged pursuant to it. It was held that the Board had "determined" rates within the meaning of Section 1002(d) and (e) of the Federal Aviation Act, 49 U. S. C. § 1482(d) and (e) (1970), without complying with the requirements of those sections that this be done after notice and hearing, and by reference to statutory ratemaking criteria. The case was remanded to the Board for further proceedings consistent with the court's opinion.

July 28, 1970. The Board continued the rounded-up October 1, 1969, fares in effect, declaring that these were the only ones that could be lawfully charged pending establishment of new fares. Order 70-7-128. It called in the same order for carrier filings of new fares to be effective October 15, 1969, such fares to be "free of any compulsion that may have been inherent in the invalid Order 69-9-68."

July 29, 1970. The Board moved this court for a stay of its mandate in *Moss I* for ninety days to permit establishment of new fares in the manner described above. The stay was granted.

September 24, 1970. The Board suspended all new fares filed pursuant to its July 28 order, except those that re-established the rounded-up October 1, 1969, fares. These newly filed, though unchanged, fares were, in the Board's view, free of any compulsion from the order invalidated in *Moss I.*

October 7, 1970. Petitioners requested this court to stay its mandate in *Moss I* for a further period, and thus to express its disapproval of the manner in which the Board had re-established the rates. We were further requested to order the Board to rule promptly on petitioners' request for relief from the fares held unlawful in *Moss I.* Both requests were denied.

February 25, 1971. The Board initiated proceedings to determine whether the rates charged between October 1, 1969, and October 15, 1970, were "unjust and unreasonable." The Board noted the pendency of a number of class actions brought in district courts against the airlines for recovery of part of the fares ruled unlawful in *Moss I.* On February 19, 1971, these cases had been transferred by the Judicial Panel for Multidistrict Litigation to the United States District Court for the Northern District of Illinois. *In re Air Fare Litigation,* 322 F. Supp. 1013 (Jud. Pan. Mult. Lit., 1971). Partly in order to aid the Northern District of Illinois to resolve these suits, the Board deferred decision of the question of whether it had power to grant relief, and proceeded directly to the question of the reasonableness of the challenged fares. The class action suits were in fact stayed pending the Board's resolution of that question, *Weidberg* v. *American Airlines,* 336 F. Supp. 407 (N. D. Ill., 1972), and the suits were subsequently dismissed on the basis of the Board order now under review. *Weidberg* v. *American Airlines,* No. 70 C 1879 (N. D. Ill., filed Dec. 10, 1973).

April 9, 1971. The Board issued its final decision in Phase 6B of the *DPFI* (load factors), and its tentative findings and conclusions in Phase 7 of the *DPFI* (fare levels).

The latter proposed a fare level 12% higher than the unlawful October 1, 1969 rates. After taking interim adjustments into account, this higher level required an increase of 9% in the then prevailing rates. The Board authorized an increase of 6% pending its final decision in Phase 7. (The Board's final decision, affirming its tentative one, came on August 11, 1973.)

May 7, 1971. Fare increases of 6%, as provided for in the Board's April 9 orders, went into effect. The lawfulness of these rates has not been challenged by petitioners.

July 11, 1973. The Board issued Order 73-7-39, its final decision denying relief from the rates found by this court in *Moss I* to have been unlawfully "determined."

July 16, 1973. Petitioners sought direct review in this court of Order 73-7-39.

The foregoing is an account of three sets of interrelated proceedings before the Board, dealing with (1) the establishment of lawful fares in place of those found unlawful in *Moss I*, (2) the propriety of relief for the public from those unlawful rates, and (3) the general matter of how rates were properly to be set in the future. Since petitioners claim that lawful fares were not re-established until May 7, 1971, they seek relief from rates charged during the period running from that date back to October 1, 1969.[2] This attempt to establish the unreasonableness of rates charged during that period rests largely on the retroactive application of standards set in the *DPFI*.

During the period in which the October 1, 1969, rates were charged, the airlines did not in fact earn excessive profits from their passenger operations. The average rate of return on such

2. Br. Petitioners at 9. There is dispute among the parties as to when lawful passenger fares were re-established. The intervenors claim, for example, that since petitioners made no attack upon the board's action in allowing newly-filed but unchanged fares to go into effect on October 15, 1970, the latter date marks the end of the period for which relief could be sought, at least with the aid of *Moss I*. Br. Intervenors Braniff Airways, *et al.* at 10. Since we find that petitioners have not yet established their entitlement to relief for any period, we need not resolve this dispute.

operations for the year ending September 30, 1970, was found by the trial examiner to have been 3.29 percent in the case of the trunk line carriers, and –.40 percent in the case of the local carriers.[3] Petitioners do not challenge these findings. A fair and reasonable rate of return had been established by the Board in 1960 in its *General Passenger Fare Investigation* at 10.5 percent. This was increased in Phase 7 of the *DPFI*, concluded in 1971, to 12 percent for the trunk lines and 12.35 percent for the locals. Assuming, as the Board did, that a fair rate of return for the period in question lay somewhere between these two figures, plainly it was not achieved. The poor performance was nothing new. A return as high as 10 percent had been achieved by the trunk lines during only two of the ten years prior to 1970, the average for that decade being 6.2 percent. App. 522.

Petitioners argue, however, that the absence of excessive operating profits is not dispositive. They have instead made the following claims:

(1) The right to recover passenger fares is not dependent on their having been "unreasonable," but solely on their having exceeded the last preceding rates that were lawfully established (*i.e.*, the pre-October 1, 1969, rates).

(2) Even if recovery of unlawfully established rates is to be had only to the extent that they exceeded what was "reasonable," such an excess existed here because

(a) the rate of return for the period in question should be recomputed on the assumption that the airlines experienced the higher load factors which the Board determined

3. Initial Decision of Trial Examiner Ross I. Newmann at 23; App. 504. The figures were derived by use of the so-called "by-product" or "revenue-offset" method of allocating the costs of carrying passengers and belly cargo. By this method the cost of belly cargo is simply equated to the revenue it generates. The trial examiner further found that the more refined "joint product" method, by which the actual (and greater) costs of belly cargo are sought to be identified, yielded similar figures, 4.19 percent and —.13 percent respectively. Initial Decision at 23-24; App. 504-05.

in Phase 6A of the *DPFI* should be the standard for the future;

(b) the rate of return should be recomputed on the assumption that all seats had been sold for full fares, with a reduction or "dilution" on account of discount fares only to the extent of 12 percent, this figure being regarded by petitioners as reasonable in light of the Board's determination in Phase 5 of the *DPFI* that future fare levels would be constructed on the assumption that no discounts were offered at all;

(c) the airlines' "indirect" costs (those not directly associated with the operation of aircraft) should be limited to 48.4 percent of total costs, this standard also being one that was allegedly adopted in the *DPFI*.

(3) Even if the general fare level did not yield profits which, as properly recomputed, were "unreasonable," recovery should be had by those who paid unjustly discriminatory rates during the period in question.

The Board gave varied responses to these claims.[4] The first claim—that for a refund of all amounts charged in excess of pre-October 1, 1969, rates—the Board dismissed on the basis of contrary court decisions. The second set of claims—those attempting to establish the unreasonableness of charged rates by the retroactive application of standards adopted in the *DPFI*—the Board turned aside in two ways. It found in some instances that the fares were not unreasonable even if tested by the appropriate rate making standards. In other instances, however, it declined to apply those standards retroactively because doing so would be "inequitable." The Board's response to the third claim—that based on fare structure—was cast even more clearly in terms of the equity of recovery rather than the propriety of the fares.

4. *See generally* CAB Order No. 73-7-39, July 11, 1973; App. 732.

II.

There are a number of vexing questions presented by this appeal. Is there *any* right of recovery for previously charged and properly filed airline fares?[5] If so, who may grant it: the Board, this court, a district court, or some combination?[6] And what is the standard of recovery, assuming it is the same in the various forums which may grant it? We need only address the last of these questions, for we find that the proper standard for recovery is such as to preclude relief to these petitioners in any forum—at least at this stage of the proceedings.

As there is scant precedent for the granting or denial of recovery of unlawful airline fares,[7] we begin with a brief review of the problem as it has arisen in analogous regulatory contexts.

5. *Compare T.I.M.E., Inc.* v. *United States*, 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959) (absence of reparations power in ICC precludes recovery for unreasonable motor carrier rates), *with Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 83 S. Ct. 157, 9 L. Ed. 2d 142 (1962) (shippers could recover for misrouting by motor carriers). These cases are discussed at greater length below.

6. All four possibilities are presented in this appeal. The district judge before whom the class actions were consolidated, *see*, ... U. S. App. D. C. ....., 521 F. 2d 301, *supra*, apparently assumed that he could grant relief based on a Board finding that the fares in question were unreasonable. 336 F. Supp. 407 (N. D. Ill. 1972). The Board itself was of course requested to grant relief. Having failed in that forum, petitioners now urge that we as an appellate court exercise an inherent authority to order restitution ourselves, as ostensibly we did in *Williams* v. *Metropolitan Area Transit Comm'n*, 134 U. S. App. D. C. 342, 415 F. 2d 922 (1968), *cert. denied*, 393 U. S. 1081, 89 S. Ct. 860, 21 L. Ed. 2d 773 (1969).

7. The only precedent known to us is *Danna* v. *Air France*, 334 F. Supp. 52 (S. D. N. Y. 1971), in which recovery was sought of allegedly discriminatory passenger fares. The district judge dismissed on the ground that *T.I.M.E., Inc.* v. *United States, see* note 5 *supra*, barred any recovery. The judgement was affirmed, but on the more limited ground that recovery must in any case await a determination by the Board that the fares in question were indeed unlawfully discriminatory. 463 F. 2d 407 (2d Cir. 1972).

(a) *Interstate Commerce Commission.*

Part I of the Interstate Commerce Act explicitly imposes upon subject rail carriers a liability, enforceable either before the ICC or in a district court, for violation of the Act's commands, among them that just, reasonable, and nondiscriminatory rates be charged.[8] The standard of recovery is, of course, justness and reasonableness, a matter within the Commission's primary jurisdiction.[9] There is no comparable right of recovery expressly given by the Federal Aviation Act for unlawful airline rates. Still, there is at least one railroad rate case that is highly relevant to our problem. In *Atlantic Coast Line R. R.* v. *Florida,* 295 U. S. 301, 55 S. Ct. 713, 79 L. Ed. 1451 (1935), recovery was sought of rate increases which the Commission had itself ordered into effect, assertedly to prevent a discrimination against interstate commerce. The Commission's order was judicially reversed for lack of adequate factual findings. The Commission subsequently issued new and more ample findings, re-established exactly the same rates, and was this time upheld in the courts. In these circumstances, the Commission was thought to be "without power to give reparation" for the improperly established rates. 295 U. S. at 312, 55 S. Ct. 713. The ratepayers' only remedy was for restitution, which Justice Cardozo described as follows:

> A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. . . . The claimant to prevail must show that the money was received in such

8. 49 U. S. C. §§ 1(5), 3(1), 8, 9 (1970). A similar regimen applies to water carriers subject to Part III of the Interstate Commerce Act. *See* 49 U. S. C. §§ 901 *et seq.*, 908 (1970).

9. *Compare Texas & P. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 448, 27 S. Ct. 350, 358, 51 L. Ed. 553 (1907) ("a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke the redress through the Interstate Commerce Commission"), *with J. C. Famechon Co.* v. *Northern P. R.R.,* 23 F. 2d 307 (8th Cir. 1927) (primary resort to Commission not necessary where issue is legal construction of filed tariff).

> circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.

Id. at 309, 55 S. Ct. at 716. In concluding that equity required no restitution—not even the partial restitution the lower court had granted—the Court relied primarily on the fact that following its earlier reversal the Commission had made new and procedurally adequate findings that the invalidated rates had in fact been just and reasonable.[10]

Interstate motor carriers are now subject to the same express statutory liability for unreasonable rates as are the railroads.[11] Prior to 1965, however, the Commission was, with respect to motor carriers, in the same position as the Board—lacking any express reparation or refund power. That lack was held by the Supreme Court in *T. I. M. E., Inc.* v. *United States,* 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959), to preclude recovery by the payers of unreasonable motor carrier rates, at least where the claim was made by way of a defense in an action by the carrier to collect rates which had been properly filed with, and not challenged before, the Commission. Three years later, however, in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.,*

10. The existence of a judicial power to restore the fruits of a subsequently invalidated rate order gains further support from Section 74 of the ALI Restatement of the Law of Restitution (1937):

> JUDGMENTS SUBSEQUENTLY REVERSED. A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

The existence of such power in regulatory agencies themselves appears to have been recognized by the *Supreme Court in United Gas Improvement Co.* v. *Callery Properties,* 382 U. S. 223, 229, 86 S. Ct. 360, 364, 15 L. Ed. 2d 284 (1965), where it was stated that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order."

11. *See* Pub. L. No. 89-170, 79 Stat. 651 (1965), *as codified,* 49 U. S. C. § 304(a) (1970); *Land O'Lakes, Inc.* v. *United Buckingham Freight Lines, Inc.,* 351 F. Supp. 102 (D. Minn. 1972).

371 U. S. 84, 83 S. Ct. 157, 9 L. Ed. 2d 142 (1962), the court held, over the objection of *T. I. M. E.'s* author (Harlan, J.), that common law remedies against common carriers could survive the enactment of the statute so long as they were consistent with its regulatory scheme. Such a surviving remedy was that for misrouting of a shipper's goods, on which ground the plaintiff in *Hewitt-Robins* in fact prevailed.

(B) *Federal Power Commission.*

The only express reference to recovery of excessive rates in the Natural Gas and Federal Power Acts is in connection with the exercise by the FPC of its power to suspend rates for five months pending their investigation. *See* 15 U. S. C. § 717c(e), 16 U. S. C. § 824d(e) (1970). Suspended rates may go into effect after that period if the investigation is incomplete, but if they are later finally determined to be excessive, the Commission has power to order their refund. Recovery is for the excess of charged rates over what was just and reasonable, with the price specified in a seller's certificate of convenience and necessity serving as a "refund floor." *See FPC* v. *Sunray DX Oil Co.*, 391 U. S. 9, 23-24, 88 S. Ct. 1526, 20 L. Ed. 2d 388 (1968).[12] Refunds may also be ordered by way of the FPC's conditioning the certification of natural gas sales on the refunding of excessive rates that have previously been charged, either under a temporary, unconditioned certificate, *see, e.g., Continental Oil Co.* v. *FPC*, 378 F. 2d 510, 530-32 (5th Cir. 1967), *cert. denied*, 391 U. S. 917-19, 88 S. Ct. 1801, 20 L. Ed. 2d 655 (1968), or under a permanent, unconditioned certificate that has subsequently been invalidated in the courts. *See, e.g., United Gas Improvement Co.* v. *Callery Properties*, 382 U. S. 223, 86 S. Ct. 360, 15 L. Ed. 2d 284 (1965). Such refunds would again be limited to the excess of actual over reasonable charges, and

12. *See also, In re Hugoton-Anadarko Area Rate Case*, 466 F. 2d 974, 990 (9th Cir. 1972) (refunds could be forgiven by the Commission if they would otherwise treat principal seller "unfairly as compared to the other producers").

might be even less, since "the issue of a refund in [such] circumstances turns upon equitable considerations." *Public Service Commission of New York* v. *FPC*, 117 U. S. App. D. C. 287, 329 F. 2d 242, 249-50, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U. S. 963, 84 S. Ct. 1644, 12 L. Ed. 2d 735 (1964).[13]

(C) *Metropolitan Area Transit Commission.*

A third area in which this court in particular has confronted the problem of public recovery of unlawful rates is in connection with the Washington Metropolitan Area Transit Commission which for a time oversaw the operations of an independent D. C. Transit company under a multistate Compact between the District of Columbia, Maryland and Virginia.[14] The Compact required the Commission to establish, and Transit to charge, just and reasonable rates. There was no provision for recovery or refund of excessive rates.[15] Nonetheless, we held *Bebchick* v. *Public Utilities Commission*, 115 U. S. App. D. C. 216, 318 F. 2d 187, 203-04, *cert. denied*, 373 U. S. 913, 83 S. Ct. 1304, 10 L. Ed. 2d 414 (1963), that where the Commission had improperly authorized a fare increase, the amount realized could not be retained by the company, and even if it could not be directly refunded, had somehow to be "utilized for the benefit

13. *See also Skelly Oil Co.* v. *FPC*, 401 F. 2d 726, 729 (10th Cir. 1968) ("no inequity results" where FPC orders refund of rates charged in accord with permanent certificate which was later reconsidered, seller being "on notice that the allowed rate was subject to revision"); *Plaquemines Oil & Gas Co.* v. *FPC*, 146 U. S. App. D. C. 287, 450 F. 2d 1334, 1337-38 (1971) (where uncertificated sales were later determined to have been within FPC jursdiction, it had "equitable power 'to regard as being done that which should have been done' . . . and to order refunds to be paid if necessary to achieve that goal").

14. The company's operations were taken over by the Washington Metropolitan Area Transit Authority on January 14, 1973. *See* National Capital Area Transit Act of 1972, Pub. L. No. 92-517, 86 Stat. 999 (1972).

15. *See D. C. Code* § 1-1410 (1966).

of the class who paid it." In *Williams* v. *Washington Metropolitan Area Transit Commission*, 134 U. S. App. D. C. 342, 415 F. 2d 922 (1968), *cert. denied*, 393 U. S. 1081, 89 S. Ct. 860, 21 L. Ed. 2d 773 (1969), we were more explicit about the nature and measurement of the public recovery in such a case. Such recovery was held to be "governed by the equitable considerations which apply to suits for restitution generally." We found that in the circumstances of that case these principles required Transit to "restore the amount realized by the fare increase only to the extent that its actual return is not reduced to an amount which all parties have agreed would be unreasonably low." *Id.* at 944-46. In *Democratic Central Committee of D. C.* v. *Washington Metropolitan Area Transit Commission*, 158 U. S. App. D. C. 107, 485 F. 2d 886, 913-15 (1973), *cert. denied*, 415 U. S. 935, 94 S. Ct. 1451, 39 L. Ed. 2d 493 (1974), we again invalidated a Commission-authorized rate increase. Once again we found "the appropriate avenue of relief . . . to be restitution," though in this instance we remanded the case to the Commission for its consideration of what exactly should be restored.

(D) *United States* v. *Morgan.*

We take note, finally, of *United States* v. *Morgan*, 307 U. S. 183, 191-98, 59 S. Ct. 795, 83 L. Ed. 1211 (1939), involving an order of the Secretary of Agriculture reducing stockyard rates to a just and reasonable level. The order was stayed pending judicial review, but the amount by which, if valid, it would reduce the stockyard owners' receipts was ordered paid into court. The Secretary's order was invalidated on procedural grounds, and the Court faced the question of the fund's disposition. The district court was instructed to proceed "in conformity to equitable principles," and primarily on the basis of what the Secretary subsequently determined to have been the just and reasonable rates for the period.[16]

16. *See also Zuber* v. *Allen*, 396 U. S. 168, 197, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969) (where the Secretary of Agriculture had improperly ordered increase in certain milk prices, the proceeds of such increase having been held in escrow pending judicial review, court "struck an equitable balance" in restoring to purchasers only amounts paid in after District Court reversal of Secretary's order).

The foregoing brief survey suggests that if there is a remedy for properly filed airline rates later found to be unlawful, it is of one of the following kinds: a surviving common law (or conceivably an implied statutory) remedy for unreasonable charges by a common carrier (analogous to that recognized in *Hewitt-Robins, supra*); a right to seek the exercise by the CAB of its power to condition certificates of convenience and necessity on the refunding of more-than-reasonable fares (analogous to that recognized in *Continental Oil* and *Callery, supra*); or a right to have the CAB or the courts order the restitution of amounts collected by virtue of erroneous orders or judgments (by analogy to *Atlantic Coast Line, Morgan,* and this court's *Transit Company* cases).

One right which clearly does not exist is the one petitioners claim for recovery of all amounts in excess of the last lawfully established rates. To cite only the most prominent contrary authority, the Supreme Court in *Atlantic Coast Line* expressly rejected the suggestion that where a rate order was procedurally defective the carriers should restore the excess over the last lawfully established rate, and thus "pay the price of the blunders of the commerce board." 295 U. S. at 314, 55 S. Ct. at 718. Significantly, the dissenters in that case would have granted just the recovery that petitioners now seek. *See id.* at 318-30, 55 S. Ct. 713.[17] Our holdings in *Williams* v. *Washington Metro-*

17. Another express rejection of petitioners' theory appears in *Plaquemines Oil & Gas Co.* v. *FPC*, 146 U. S. App. D. C. 287, 450 F. 2d 1334 (1971), *supra* note 13. At issue there was the FPC's power to order refunds for uncertificated sales that were only later determined to be within the Commission's jurisdiction. We endorsed the principle (applied by the Commission to some of the uncertificated sales) that since it lacked cost-of-service information for the period, it would consider rates that were "in line" with those prevailing in the region to be in compliance with the Act. We disapproved the principle (applied by the Commission to other uncertificated sales) that refunds were required simply because the charged rates were not on file with the Commission. *See id.* at 1336-39.

politan Area Transit Commission, 134 U. S. App. D. C. 342, 415 F. 2d 922 (1968), *cert. denied*, 393 U. S. 1081, 89 S. Ct. 860, 21 L. Ed. 2d 773 (1969), and *Democratic Central Committee of D. C.* v. *Washington Metropolitan Area Transit Commission*, 158 U. S. App. D. C. 107, 485 F. 2d 886 (1973), *cert. denied*, 415 U. S. 935, 94 S. Ct. 1451, 39 L. Ed. 2d 493 (1974), both discussed *supra*, are also inconsistent with petitioners' claim.

We find no support for petitioners' "last lawful rate" theory in the two cases on which they primarily rely, *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212 (6th Cir. 1970), *cert. denied*, 402 U. S. 999, 91 S. Ct. 2169, 29 L. Ed. 2d 165 (1971), and *Chicago, Milwaukee, St. P. & P. R. R.* v. *Alouette Peat Products*, 253 F. 2d 449 (9th Cir. 1957). The former is a case in which the last lawfully established rate happened also to be the just and reasonable one. An ICC order cancelling a proposed rate increase had been stayed pending review. When the stay was later lifted, recovery was sought of the amounts which, because of the stay, were charged in violation of the ICC's by-then-vindicated cancellation order. The rate-payers prevailed, not because the lower rates were the last lawfully established rates, but because the Commission had correctly found that they were the highest rates that could justly and reasonably be charged. *See* 433 F. 2d at 229-32. *Alouette* is distinguishable as a case in which the full amount of a rate increase was restored, even though at least part of that increase appeared just and reasonable, because the increased rates were not properly on file with the Commission.[18] We have not discussed the matter of "overcharges," or charges in excess of

18. Railroad rate increases are normally to be effective only on thirty days' notice. The Commission made an exception to this rule, and allowed five days' notice for increases of certain rates of six cents or twenty percent, whichever was less. The carrier put into effect, on five days' notice, a twenty per cent increase, which happened to be more than six cents. The new rates were held not to be lawfully on file with the Commission, and the full amount of the increase was ordered restored.

properly filed rates. Manifestly, the case for a strict rule of recovery is far stronger in that context.[19]

We have concluded that the Board correctly focused on the equity of restitution and not just the reasonableness of past rates. Reasonable rates, in this regulated industry as in others, are those which are as low as possible but still allow the industry to provide "adequate and efficient service" and earn a reasonable rate of return, thus assuring its ability to attract necessary capital in the future. The just and reasonable rate, in short, is the rate at which, under a given set of economic circumstances, the industry will perform efficiently as that term is defined by the statute.

There are distinct equitable considerations which may prevent a recovery even where fares had been found to exceed what

19. We may also pass quickly over petitioner Roberts' claim that the Board was without power to inquire into the justness and reasonableness of past rates. It is true that the Board cannot make rates retrospectively, *see, e.g., Williams* v. *Metropolitan Area Transit Commission*, 134 U. S. App. D. C. 342, 415 F. 2d 922, 940 (1968), but this is not the same thing as inquiring into the propriety of relief and into any issue on which relief turns. *See Atlantic Coast Line R. R.* v. *Florida*, 295 U. S. 301, 312, 55 S. Ct. 713, 718, 79 L. Ed. 1451 (1935) (Interstate Commerce Commission was without reparations power but "not without power to inquire whether injustice had been done and to report accordingly.") Even assuming that the Board could not itself order recovery, we have seen that the propriety of recovery may turn on the reasonableness of rates. The Board's primary jurisdiction over that question strongly argues for its power to furnish a retrospective answer to it; even if it is doing so merely as a prelude to action by the courts. In fact the power to do so seems amply embraced within the Board's powers to "conduct such investigations . . . as it shall deem necessary to carry out the provisions of . . . this chapter," 49 U. S. C. § 1324(a) (1970), and, upon "complaint in writing with respect to anything done . . . in contravention of . . . this chapter, . . . to investigate the matters complained of." *Id.* § 1482(a). The Supreme Court in *United States* v. *Morgan*, 307 U. S. 183, 198, 59 S. Ct. 795, 803, 83 L. Ed. 1211 (1939), held that the very similar statutory powers of the Secretary of Agriculture enabled him to investigate the reasonableness of past rates where his doing so would "afford an appropriate basis for action in the district court in making distribution of the [escrow] fund in its custody."

was just and reasonable. It might be thought, to take the facts of our case as an example, that the reasonable rate for a past period was one which paid for a far more modest service than was actually provided, but that since a lavish service was in fact provided, with apparent Board blessings, there is no equity in extracting profits which never existed. Other circumstances can be imagined which might have already denied the airlines the fruits of their unreasonable prices, and thus make it inequitable to require them to be disgorged. The excessiveness of prices, perhaps in combination with an unexpected economic downturn, might itself have caused a ruinous decline in the volume of air travel, with consequent losses to the airlines. Even if excessive profits were made in a given period, there may be inequity in trying to recover them, particularly if large classes of people are involved. As to who receives relief, it may be impossible to reimburse those who actually paid the unreasonable rates, so that the best that can be done is to establish a fund on the carrier's books to be applied for the benefit of future fare-payers.[20] As to who provides relief, past stockholders may have reaped the benefits of the unreasonable fares and departed the scene, leaving future stockholders to be adversely affected by the recovery. The bite which is effectively taken from future earnings by a recovery fund may in turn impair the health of the industry, to the disadvantage of the fare-payers themselves.

The facts of our case are illustrative. The excess profits sought to be recovered were not in fact earned but must be hypothesized by a recomputation of costs and revenues. A substantial fare-payer recovery on this theory would in practical effect mean that an airline industry which had performed badly in the past (from the investors' point of view) would be all the more likely to perform badly in the future. The equitable aspects of refunding past rates are as inextricably entwined with the Board's

20. This is the form of recovery ordered in *Bebchick* v. *Public Utilities Comm'n*, 115 U. S. App. D. C. 216, 318 F. 2d 187, *cert. denied*, 373 U. S. 913, 83 S. Ct. 1304. 10 L. Ed. 2d 414 (1963), and also the form which petitioners propose in this case.

normal regulatory responsibility, as such refunds may substantially affect the future rates, performance, and health of the industry. The statutory scheme thus seems to require that the Board pass in the first instance not only on the reasonableness of past rates, but on the equity of any recovery where such rates are found to have been unreasonable. *Cf. Democratic Central Committee of D. C.* v. *Washington Metropolitan Area Transit Commission*, 158 U. S. App. D. C. 107, 485 F. 2d 886 (1973), *cert. denied*, 415 U. S. 935, 94 S. Ct. 1451, 39 L. Ed. 2d 493 (1974).

III.

The Board's approach to its task of determining whether the airlines had been unjustly enriched was to look first at their actual rate of return during the period in question, calling this "the best overall index of the reasonableness . . . of passenger fares," App. 501, and upon finding it inadequate, as it undisputedly was, to assess petitioners' specific arguments as to why and how that rate of return should be readjusted. We turn now to those arguments.

(A) *Load Factors.*

A load factor is simply an expression of how full airplanes are. It is the ratio of the number of miles flown during a given period by revenue-paying passengers, to the number that could have been flown had every available seat been filled. Before 1971, it had been the Board's practice to accept for ratemaking purposes the load factors that the airlines actually experienced, *i. e.*, to determine revenue needs and the fares necessary to meet them on the assumption that the flights an airline proposed to offer would be only as full as past experience suggested. In 1971, however, the Board came to the conclusion in Phase 6B of its *DPFI* that this policy had fostered overcapacity in the industry. Barred from price competition, the airlines vied for the available traffic by scheduling more and more flights, which were more and more empty and required higher and

higher fares to pay for them. The higher prices depressed the volume of air travel, further aggravating the overcapacity problem. To break the cycle the Board proposed standard load factors which would in the future be assumed when calculating the revenue that a proposed flight would generate. Actual load factors would of course vary, but by making rates with reference to the assumed factors the Board would insure that *earnings,* rather than *fares,* would fluctuate with load factors. The airlines would thus have a strong incentive to reduce overcapacity. *See generally* Order 71-4-54; App. 182.

The last point is critical. The Board disavowed any intent in adopting the load factors standards to force the airlines into particular scheduling molds. Its purpose was to force an adjustment by the airlines to its new load factor constraints, but exactly what the adjustment would be, the airlines themselves were to decide. *Id.* at 190. The policy was thus entirely prospective in nature, as is borne out by the Board's adoption, for the trunklines, of an interim standard substantially lower than that to which it would hold the airlines in the long run.

The long run factors adopted by the Board were 55 percent for the trunklines, 44.4 percent for the local lines, and 54.1 percent for the industry as a whole; the interim trunkline factor was 52.5 percent.[21] During the period in which the challenged rates were charged, the trunk airlines actually experienced a load factor of only 48.9 percent, and the locals one of 43.2 percent.[22] Petitioners would recalculate the airlines' earnings on the basis of the 54.1 percent figure.[23]

21. *Id.* at 228. The interim trunkline standard was adopted in Phase 7 of the *DPFI,* in which the Board considered the question of what changes in the fare level were dictated by the load factor and other newly adopted rate making standards. *See* Order No. 71-4-59; App. 283.

22. Exhibit BE-19; App. 38.

23. Actually, petitioners offered a recalculation of the trunklines' rate of return only, omitting the local carriers' rate of return and contenting themselves with a statement in their brief that their computations must understate the excess profits for the industry as a whole, the locals being unaccounted for. Br. Petitioners at 52. There is of course no necessary logic in this position. Indeed, the locals maintain that even the full retroactive application of petitioners' proposed load factor, dilution, and indirect cost standards leaves them far short of an adequate return. The claim appears to be uncontested either before the Board or this court, and therefore gives further support to the Board's result.

The Board's answer was, first, to entertain for the trunklines only the interim factor as a possible basis for retroactively computing reasonable rates. Petitioners' contention, that the higher, permanent factor must be applied to the earlier period, appears to rest on the assumption that that figure represents an ideal load factor—then and now. They overlook the fact that one of the circumstances of which a regulatory agency may take account is past regulation. The Board's own past policies of restricting price competition and allowing service competition to flourish may be partly to blame for overcapacity in the industry. However the airlines came to their present pass, it was the Board's obligation to bring them through it with a minimum of disruption. In short, what is just and reasonable encompasses not only what is ideal, but what approaches it in an orderly and reasonable fashion. Hence the interim standard. Under the circumstances the Board might well have abused its discretion had it ignored that standard in favor of the permanent one.

The Board expressed doubt as to the reasonableness—or at least the equitableness—of applying even the 52.5 percent figure retroactively. It also found, however, that a 52.5 percent load factor produced a rate of return of only 6.13 percent for the trunklines, while a 44.4 percent factor produced a .65 percent return for the local carriers.[24] Neither earned unreasonable rates of return, therefore, even if the appropriate load factors were applied retroactively. We have seen no plausible attack on this calculation, or on the inadequacy of the rate of

24. See Exhibits BE-21, 22, 25, 26; App. 39-42.

return which it yields. We uphold the Board in its conclusion that thus far no unreasonableness had been established.[25]

(B) *Dilution.*

The term refers to the loss of revenues, expressed as a percentage, from selling seats at less than full fares. There are any number of ways in which such sales are made—youth fares, military fares, family fares, excursion fares, standbys, and so on. Such discount fares work an obvious discrimination against full fare passengers and are therefore facially inconsistent with "rule of equality" contained in § 404(b) of the Federal Aviation Act, 49 U. S. C. § 1374(b) (1970). They have nonetheless been tolerated by the Board on the theory that they could benefit the full fare passenger, first, by stimulating new and increased demand, and thus paving the way for long run economies of scale (*e.g.*, larger, more economical aircraft); and, second, by filling seats that would otherwise be empty, and thus allowing the full fare passenger to subsidize those seats partly rather than fully.[26]

On such reasoning the Board in 1965 approved the use of military standby and youth standby and reservation fares.[27] On review the Fifth Circuit remanded the matter of the youth fares for further consideration, *see Transcontinental Bus System, Inc.* v. *CAB*, 383 F. 2d 466 (5th Cir. 1967), *cert. denied*, 390 U. S. 920, 88 S. Ct. 850, 19 L. Ed. 2d 979 (1968). Such consideration ultimately took the form of Phase 5 of the *DPFI*,

25. In fact the Board found that even if the long term industry-wide factor of 55 percent were applied retroactively, it would produce a rate of return of only 8.83 percent for the trunklines. Board Decision at 17 n. 39; App. 749. Petitioners have not attacked any of these calculations, but rest their hopes on the retroactive application, in addition to the load factors, of dilution and indirect cost standards. The latter arguments are discussed, and rejected, below.

26. *See* Order No. 72-12-18 at 11-12; App. 543-44.

27. Order F-22186 Dockets 15845 *et al.* (May 20, 1965); Order F-23138, Docket 16826 (Jan. 20, 1966).

in which a number of discount fares were re-evaluated. Some of these the courts had ordered the Board to reconsider (*e.g.*, family fares, *see Trailways of New England, Inc.* v. *CAB*, 412 F. 2d 926 (1st Cir. 1969)), and some it had not, but all had apparently had the Board's previous approval. *See* Order No. 70-12-18; App. 537-39.

The Board in Phase 5 concluded that in general the bases on which the discriminatory discount fares had been justified were not sound. Little additional traffic had been generated, and the potential cost savings to be realized from traffic increases were found to be slight in any event. More important, the fares were not filling seats that would otherwise be empty; instead, new capacity was being added to accommodate the discount passengers. In essence the Board recognized that it was facing another aspect of the same problem that concerned it in *DPFI* Phase 6B dealing with load factors: If the airlines, barred from price competition, tended to compete by increasing their capacity, and if this tendency was made chronic by their ability to pass the cost of overcapacity along to the fare-payers, it did not help to allow the airlines to discriminate among those fare-payers; indeed, it only made matters worse for those discriminated against. Put another way, a limitation on dilution is a necessary complement of the load factor standards, for the burden of overcapacity on the full fare passenger is not substantially lessened if, while requiring that only 45 percent of an average flight's seats be *empty*, the Board allows another 20 percent (let us say) to be *half empty* in the sense of being filled by passengers who do not pay full fares.

The Board therefore resolved in Phase 5 to tolerate only certain kinds of discounts which were shown to have the potential of enhancing an airline's short run profits, *i. e.*, for filling flights that were already scheduled to fly and would otherwise fly empty. To insure that the discounts would not remain in effect, and become a burden on the full-fare passenger in the way we have

described, the Board limited the duration of the discounts to eighteen months, and also announced a powerful disincentive to their use, namely, it would in future fare proceedings assume zero dilution. It would assume, in other words, that all seats were sold for full fares.[28]

It is on this basis that petitioners insist that the airlines' revenues for the period in question be recomputed to allow a dilution of only 12 percent of what full fare receipts would have been. The 12 percent figure was proposed by their sole expert witness, who testified that discount traffic accounting for smaller amounts of dilution tended to be carried by existing capacity, but that when such traffic took a larger bite from revenues, it tended to be accommodated by capacity increases.

The Board responded in several ways. It stated that there was no evidence to support the 12 percent figure (as indeed there appears to be none[29]), and that a percentage standard was in any case "faulty in concept" (as appears to be true, the effect of a discount upon capacity being much more a matter of its timing than the amount of traffic it generates).[30] We may assume, without deciding, that these attacks on petitioners' proposed dilution standard would be inadequate without some consideration by the Board of whether some *other* standard would be more acceptable. In the event, the Board went on to reject the retroactive

28. *See generally* Order No. 72-12-18; App. 529.

29. Petitioners' expert witness himself admitted that "we have arbitrarily, if I may use that word in a mathematical sense as it was used this morning, drawn that line temporarily at 12 percent." Tr. 641; App. 641. The only justification given for it was that certain evidence adduced in Phase 9 of the *DPFI* tended to show that dilution traffic was accommodated by added capacity only in the long haul markets, and only in these markets did dilution exceed 12 percent. *See* Tr. 651-54; App. 74-77.

30. Thus, a sharp discount offered on short notice for flights already scheduled could generate a large amount of additional traffic but no additional capacity, while a less attractive discount planned longer in advance could cause the airline to schedule additional flights to accommodate the expected traffic increase, even though it was very slight.

application of any dilution standard. It stated that the dilution policy of Phase 5

> was intended to provide the carriers with an "incentive to make sound pricing decisions which will take into account both the long-term and short-term factors." Manifestly, this policy was designed to provide incentives for the future, and was not intended to be applied retroactively.

Board Decision at 25; App. 757.

While this appears to represent a conclusion by the Board that the computation of just and reasonable rates for the period in question need not incorporate a limit on the use of discount fares, that conclusion was clearly alloyed with a concern over the inequity of a retroactive dilution adjustment. The sentences quoted above were followed in the Board opinion by its statement that "[f]or the reasons previously given, such a retroactive application would be highly arbitrary *and inequitable.*" *Id.* (Emphasis supplied.) The "reasons previously given" included the fact that, up to and including the period in question, the various discounts were approved by the Board.

The Board's conclusion that retroactive adjustment for dilution would be "arbitrary and inequitable" seems to us persuasive, particularly when viewed in the broader context of airline ratemaking. The laws of supply and demand operate in the airline industry as elsewhere. Different fare structures and schedules will generate different amounts of traffic, and different rates of return. The number of solutions to the supply-demand equation is infinite. The Board's approach has not been to choose a particular solution, but to impose constraints on the solutions the airlines may choose (*i.e.*, that those solutions must entail a reasonable rate of return, 55 percent full airplanes, no discrimination, etc.). The benefits of innovation and competition are thus to some extent preserved by allowing the airlines to devise their own solutions, and then to out-perform those solutions by operating more efficiently (and more profitably) than had been assumed.

In this context it does indeed seem "faulty in concept" to impose a particular ratemaking constraint upon a prior period during which, of course, the private initiative which it was intended to elicit never occurred. And it is certainly inequitable by such retroactivity to deprive the carriers of the chance to make a profit from operations conducted within that constraint. The inequity is greater when inadequate profits were made by the carriers even under the constraints then applicable. Petitioners are in the position of claiming that profits which never existed should be disgorged because they would have existed had the proper regulatory guidelines been in force, when in fact there is no way to know whether such profits would have been earned or not. The Board's rejection of this position as "arbitrary and inequitable" seems to us completely sound.

(C) *Indirect Costs and Costs Generally.*

Petitioners also claim that during the period in question the airlines experienced excessive indirect costs, or costs not related to the actual operation of aircraft. The claim has undergone something of an evolution. Before the Commission it was argued that ratemaking standards adopted in the *DPFI* required that indirect costs for the period be limited to 48.4 percent of direct costs. The Commission pointed out in response that the 48.4 percent figure had been employed in Phase 7 of the *DPFI* (that concerned with fare levels) solely for the purpose of forecasting indirect costs. In the Commission's words, "[i]t is not a Board standard, nor does it have any relevance to the past period." Board Decision at 19; App. 751. The Board also observed that the indirect costs actually experienced during the period in question amounted to only 47.7 percent of direct costs, so that the airlines did not exceed the limit of 48.4 percent, even assuming it was properly regarded as such.

In their brief to this court petitioners appear to accept the Board's disposition of their argument based on the 48.4 percent figure. They now claim that it was not enough for the Board

merely to turn that particular argument aside, but that an independent assessment of the reasonableness of carrier costs, direct and indirect, was required. *Democratic Central Committee of D. C.* v. *Washington Metropolitan Area Transit Commission*, 158 U. S. App. D. C. 107, 485 F. 2d 886 (1973), *cert. denied*, 415 U. S. 935, 94 S. Ct. 1451, 39 L. Ed 2d 493 (1974), is cited for support, and particularly our holding in that case that

> The Compact placed an obligation upon the Commission to develop the record on important matters when it was unsatisfied with the record produced by the parties. The Commission, like other agencies charged with the protection of the public interest, was not created simply to "provide a forum for the" proceeding.

Id. at 905.[31]

We find no error in the Board's methodology. *Democratic Central Committee* involved a different statute, a different regulatory agency, and a different regulated industry. As we explained at some length, the transit company was a monopoly, the purpose of regulation was to afford the consumer the benefits of competition, and one of these was efficiency, which non-competitive firms tend not to achieve.

The airlines, by contrast, are in many respects highly competitive. Indeed it is partly to hold destructive competition in

31. A related claim is that petitioners were erroneously assigned the burden of proof as to the reasonableness of the unlawfully established fares. This appears not to be the case. The Board began its investigation by observing that "the carrier parties . . . propose to show the fares accord with all of the substantive standards of the Act just as in any other rate proceeding involving a past period," Order 71-2-109, App. 484; and it concluded its investigation with the statement that "[t]he carriers have abundantly satisfied the evidentiary burden cast on them in this proceeding as to the reasonableness of the fares." Board Decision at 28; App. 760. Nor can we find fault with the merits of the latter conclusion. The airlines established, with the aid of some thirty witnesses and 3500 pages of written exhibits, that their earnings during the period in question were woefully inadequate, even when analyzed according to the appropriate guidelines developed in the *DPFI*. As stated in text, that was enough to establish the reasonableness of the fares.

check that the CAB exists; price competition, for example, is effectively prevented. Other kinds of competition flourish, however. It is on this assumption that the Board accepts industry cost averages for rate making purposes. It is assumed that the carriers will compete to reduce costs below those averages and so make a larger profit.[32] To be sure, the load factor and dilution standards adopted in the *DPFI* represent efforts by the Board to control costs which competition has failed to control, but the failure derives more from an excess of competition than a dearth of it. The duties of the Board with respect to investigating carrier costs may thus be quite different from those discussed in *Democratic Central Committee*. They may well be discharged by the Board's simply inquiring into whether the applicable industry-wide cost guidelines of the *DPFI* have been exceeded.

That is what the Board did in this case. It agreed with petitioners that "the reported operating results of the carriers under the fares in question should not be accepted [but] must be adjusted to conform to [*DPFI*] standards." It concluded, however, that "the data supplied for this period conform to the Board's conclusions in the *DPFI* with respect to Treatment of Flight Equipment Depreciation and Residual Values for Rate Purposes, . . . Treatment of Leased Aircraft for Rate Purposes, . . . and Treatment of Deferred Federal Income Taxes for Rate Purposes." Board Decision at 13-14; App. 745-46. The remaining *DPFI* standards for load factor and dilution were given more extensive consideration, owing to the stress placed on them by petitioners. The Board's cursory discussion of *DPFI* guidelines on which petitioners placed no emphasis seems to us acceptable under the circumstances. Whereas in *Democratic Central Committee* we were reviewing a prospective rate making decision of the Commission, we are here reviewing the Board's conclusions as to whether there has been unjust enrichment.[33] At least where

32. *See, e.g.*, Order No. 72-8-50 (DPFI Phase 7; Fare Level) at 46; App. 527.

33. This question, significantly, we remanded to the Commission in *Democratic Central Committee*.

this is the question, and where the background to it is a period of low actual profitability for the airlines, the Board need not have given more than summary consideration to arguments the petitioners had not specifically advanced.

(D) *Discrimination.*

The claim for recovery on the ground that the fare structure was discriminatory is allied to that based on dilution, but discrimination in favor of the discount passenger is, however, only one of the unjust discriminations alleged to have taken place. Others include discrimination between (1) short and long haul travellers (the latter being allegedly the victims of mileage formulae which did not take account of the higher per mile cost of short flights), (2) travellers using congested and those using non-congested airports (again because mileage formulae did not reflect actual costs), and (3) travellers paying a single or through fare and those who must pay multiple fares (a fixed terminal charge being included in each of the latter).

As the Board noted, however, these characteristics of the fare structure had been in lawfully filed and effective tariffs for many years without Board interference. Indeed, the immediate tariffs in question, filed in response to what the Board indicated it would accept, effectively initiated a significant lessening of the discrimination of which petitioners now complain.[34] Thus the fare structure in effect during the period in question was directly responsive to what the Board considered and represented to be lawful. And the carrier, as a practical matter, had no choice but to file the tariffs they did.

34. The formula unlawfully promulgated by the Board in Order No. 69-9-68 decreased the discounts available to youth standby, youth reservation, and family fare passengers. The same Order advised the carriers that their formula-developed fares, which were to expire in January of 1970, would be renewed only if progress had been made, as assertedly it was, in the publication of additional joint fares and in making long and short haul fares more reflective of actual costs. Board Decision at 30-32; App. 762-64.

Where, as here, recovery can only be had in terms of restitution grounded in equitable considerations, the circumstances just described are not such as to mandate recovery; and we leave undisturbed the Board's action in this regard. This conclusion is fortified by, although not dependent upon, the finding that the carriers did not receive excessive and unreasonable returns from the fare level involved here, and that there is no fund of net enrichment from which restitution could appropriately be made. Assuming *arguendo* that restitution in respect of discriminatory fares may conceivably be appropriate where a carrier knows or should have known that such fares existed in an otherwise just and reasonable fare level, the facts here do not admit of the attribution to the carrier of the requisite guilty knowledge. The fares in question were charged by the carriers in reasonable reliance on the Board's explicit approval of them. To the extent that the Board was mistaken about the lawfulness of the filing, the consequences of that mistake should not be visited upon the carriers, certainly absent any actual unjust enrichment.

The order appealed from is affirmed in all respects.

It is so ordered.

NO. 75-1254

In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL W. WILLIAMS and
ROBERT O. WILLIAMS, on behalf
of themselves and all others
similarly situated,
Petitioners

v.

AMERICAN AIRLINES, INC. and
TRANS WORLD AIRLINES, INC.

PETITIONERS' REPLY BRIEF

MICHAEL W. WILLIAMS
518 S. Tancahua
Corpus Christi, Texas 78401
(512) 884-0473

Attorney for Petitioners

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PETITIONERS' REPLY BRIEF

Petitioners reply to two points raised by the respondents in their brief in opposition to the petition for certiorari.

First, we can distinguish the present case from Morgan v. United States, 304 U.S. 1, on the grounds that the case before the court now involves an admitted and adjudged total denial of notice and hearing and Morgan raised questions about the sufficiency of a hearing or of a "full

hearing."

The Court noted that the administrative hearing in Morgan began after notice on April 7, 1930 and continued until February 10, 1931. The government and appellants were represented by counsel and voluminous testimony and exhibits were introduced. In March, 1931, oral argument was had before the Acting Secretary of Agriculture and appellants submitted a brief. The Secretary issued his order on May 18, 1932 which was later vacated because of changed economic conditions. A re-hearing was begun on October 6, 1932 and the taking of evidence was concluded on November 16, 1932. On March 24, 1933 oral argument was again held by the parties. It appears that there were about 10,000 pages of testimony and over 1000 pages of statistical exhibits. 304 U.S. 16.

How can the respondents analogize those facts to a fact situation where there was a total denial of notice and opportunity to be heard to the public and where a member of the public was bodily excluded from participation in the rate-

making process!

Secondly, respondents' attempt to distinguish United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, is indeed convoluted. The Supreme Court simply held in that case, in a unanimous decision, that violation of a notice requirement in a federal statute rendered a resulting rate order a nullity.

That same principle is operative within our legal system even in cases not involving constitutional safeguards. A will made without the requisite number of witnesses is a nullity. A corporation never comes into existence if the incorporators fail to meet the requisite age or citizenship requirements, etc., etc.

Almost six years after the inception of this action, with the case receiving the attention of the highest court of the land, respondents have yet to cite a case holding that complete violation of statutory due process requirements renders a resulting quasi-judicial order anything but void. They cannot.

This Court must insure that statutory due process safeguards are adhered to and that acts in violation of those safeguards are given no legal effect. Nothing less than our social, economic and legal order would be adversely affected by the failure to do so.

Respectfully submitted,

Michael W. Williams

MICHAEL W. WILLIAMS
518 S. Tancahua
Corpus Christi, Texas
78401

(512) 884-0473

CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Petitioners' Reply Brief were served on each of the respondents by sending said copies air mail, postage prepaid, to the following persons and addresses:

Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604

Attorneys for Trans World Airlines
and American Airlines

in conformity with Rules 21 and 33 of the United States Supreme Court, this 16th day of April, 1976.

Michael W. Williams

MICHAEL W. WILLIAMS
518 S. Tancahua Street
Corpus Christi, Texas 78401
(512) 884-0473

ATTORNEY FOR PETITIONERS